



DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 245

[Docket No. FRA-2022-0019, Notice No. 1]

RIN 2130-AC91

Certification of Dispatchers

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA proposes regulations for the certification of dispatchers, pursuant to the authority granted in section 402 of the Rail Safety Improvement Act of 2008.

DATES: Comments on the proposed rule must be received by [INSERT DATE 60

DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. FRA will consider comments received after that date to the extent practicable.

ADDRESSES: *Comments:* Comments related to Docket No. FRA-2022-0019 may be submitted by going to <https://www.regulations.gov> and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name, docket number (FRA-2022-0019), and Regulatory Identification Number (RIN) for this rulemaking (2130-AC91). All comments received will be posted without change to <https://www.regulations.gov>; this includes any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> and follow the online instructions for accessing the docket.

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SUPPLEMENTARY INFORMATION:

Table of Contents for Supplementary Information

- I. Executive Summary
- II. Legal Authority
- III. Background
- IV. Section-by-Section Analysis
- V. Regulatory Impact and Notices
 - A. Executive Order 12866 as Amended by Executive Order 14094
 - B. Regulatory Flexibility Act and Executive Order 13272
 - C. Paperwork Reduction Act
 - D. Federalism Implications
 - E. International Trade Impact Assessment
 - F. Environmental Impact
 - G. Executive Order 12898 (Environmental Justice)
 - H. Unfunded Mandates Reform Act of 1995
 - I. Energy Impact
 - J. Privacy Act Statement
 - K. Executive Order 13175 (Tribal Consultation)

I. Executive Summary

Purpose of the Regulatory Action

FRA proposes to require railroads to develop programs for certifying individuals who perform dispatching tasks on their networks. Under this proposed rule, railroads would be required to have formal processes for training prospective dispatchers, as well as verifying that each dispatcher has the requisite knowledge, skills, safety record, and abilities to safely perform all of the safety-related dispatcher duties mandated by Federal laws and regulations, prior to certification. In addition, railroads would be required to have formal processes for revoking certification (either temporarily or permanently) for dispatchers who violate specified minimum requirements.

FRA is proposing this regulation in response to the Rail Safety Improvement Act of 2008 (RSIA), which required the Secretary of Transportation (Secretary) to submit a report to Congress addressing whether certification of “certain crafts or classes” of railroad employees or contractors, including railroad dispatchers, was necessary to “reduce the number and rate of accidents and incidents or to improve railroad safety.” If the Secretary determined it was necessary to require the certification of certain crafts or classes to improve railroad safety, section 402 of the RSIA stated the Secretary *may* prescribe such regulations.

The Secretary submitted a report to Congress on November 4, 2015, stating that, based on FRA’s preliminary research, dispatchers were one of the most viable candidate railroad crafts for certification. Given the safety critical role of dispatchers in facilitating safe railroad operations (which includes the coordination of emergency services in response to accidents and incidents), FRA determined that railroad safety is expected to be improved if dispatchers were required to satisfy certain standards and be certified by their employing railroads.

Summary of Major Provisions

This proposed rule would require railroads to develop written programs for certifying individuals who work as dispatchers on their territories and to submit those written certification programs to FRA for approval prior to implementation. FRA would issue a letter to the railroad when it approves a certification program, that explains the basis for approval, and a program will not be considered approved until the approval letter is issued.

FRA is proposing to require Class I railroads (including the National Railroad Passenger Corporation), and railroads providing commuter service, to submit their written certification programs to FRA no later than eight (8) months after the final rule effective date. Class II and Class III railroads would be required to submit their written certification plans sixteen (16) months after the final rule effective date. New railroads that begin operation after the final rule effective date would be required to submit their written certification programs to FRA and obtain FRA approval before commencing operations. In addition, railroads seeking to materially modify their FRA-approved certification programs would be required to obtain FRA approval prior to modifying their programs.

Railroads would be required to evaluate certification candidates in multiple areas, including prior safety conduct as a motor vehicle operator, prior safety conduct as an employee of a different railroad, substance abuse disorders and alcohol/drug rules compliance, and vision and hearing acuity.

The proposed rule also contains minimum requirements for the training provided to prospective dispatchers. The proposed requirements are intended to ensure that certified dispatchers have received sufficient training before they are hired to work as dispatchers on the railroad. The proposed requirements are also intended to ensure that certified dispatchers periodically receive recurring training on railroad safety and operating rules and practices, as well as comprehensive training on the use of new

dispatching systems and technology before they are introduced on the railroads in revenue service.

With the exception of individuals designated as certified dispatchers prior to FRA approval of the railroad's dispatcher certification program, the proposed rule would prohibit railroads from certifying dispatchers for intervals longer than three (3) years. This three-year limitation, which would be consistent with the 36-month maximum period for certifying locomotive engineers in 49 CFR 240.217(c) and conductors in 49 CFR 242.201(c), would allow for periodic re-evaluation of certified dispatchers to verify their continued compliance with FRA's minimum safety requirements.

Subpart D of this proposed rule addresses the process and criteria for denying and revoking certification. Proposed § 245.301 describes the process a railroad would be required to undergo before it denies an individual certification or recertification. This process would include providing the certification candidate with the information that forms the basis for the denial decision and giving the candidate an opportunity to rebut such evidence. When a railroad denies an individual certification or recertification, it must issue its decision in writing, and the decision must comply with certain requirements provided in the proposed rule.

A railroad could only revoke a dispatcher's certification if one of eight events occurs. Generally, for the first revocable event that is not related to a dispatcher's use of drugs or alcohol, the person's certification would be revoked for 30 days. If an individual accumulates more of these violations in a given time period, the revocation period (period of ineligibility) would become increasingly longer.

If a railroad acquires reliable information that a certified dispatcher has violated an operating rule or practice requiring decertification under the proposed rule, it shall suspend the dispatcher's certificate immediately while it determines whether revocation of the certificate is warranted. In such circumstances, dispatchers would be entitled to a

hearing. Similar to a railroad's decision to deny an individual certification, a railroad's decision to revoke a dispatcher's certification would be required to satisfy certain requirements. Finally, if an intervening cause prevented or materially impaired a dispatcher's ability to comply with a railroad operating rule or practice, the railroad would not revoke the dispatcher's certification.

Subpart E of this proposed rule discusses the dispute resolution process for individuals who wish to challenge a railroad's decision to deny certification, deny recertification, or revoke certification. This dispute resolution process mirrors the process used for locomotive engineers and conductors under 49 CFR parts 240 and 242, respectively.

Finally, the proposed rule contains two appendices. Appendix A discusses the procedures that a person seeking certification or recertification should follow to furnish a railroad with information concerning their motor vehicle driving record. Appendix B provides guidance on the procedures railroads should employ in administering the vision and hearing requirements under §§ 245.117 and 245.118.

This proposed rule does not revise 49 CFR part 241, United States Locational Requirement for Dispatching of United States Rail Operations. Furthermore, this proposed rule would not apply to dispatchers located outside of the United States as “[i]t is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”¹

Costs and Benefits

¹ *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*quoting Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949)).

FRA analyzed the economic impact of this proposed rule. FRA estimated the costs to be incurred by railroads and the Government. FRA also estimated the benefits of fewer dispatcher-caused accidents.

FRA is proposing regulations establishing a formal certification process for railroad dispatchers. As part of that process, railroads would be required to develop a program meeting specific requirements for training current and prospective dispatchers, documenting and verifying that the holder of the certificate has achieved certain training and proficiency, and creating a comprehensive record, including of safety compliance infractions, that other railroads can review when considering individuals for certification.

This proposed regulation would ensure that dispatchers are properly trained, are qualified to perform their duties, and meet Federal safety standards. Additionally, this proposed regulation is expected to improve railroad safety by reducing the rate of accidents/incidents.

FRA estimates the 10-year costs of the proposed rule to be \$5.3 million, discounted at 7 percent. The estimated annualized costs would be \$0.8 million discounted at 7 percent. The following table shows the total costs of this proposed rule, over the 10-year analysis period.

Total 10-Year Discounted Costs (2020 Dollars)²

Category	Present Value 7% (\$)	Present Value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
Development of Certification Program	929,395	953,949	132,325	111,832
Certification Eligibility Requirements	55,360	61,963	7,882	7,264
Recertification Eligibility Requirements	65,831	83,877	9,373	9,833
Training	707,334	812,820	100,708	95,287

² Numbers in this table and subsequent tables may not sum due to rounding.

Knowledge Testing	233,988	281,581	33,315	33,010
Vision and Hearing	1,586,913	1,909,692	225,941	223,874
Monitoring Operational Performance	256,017	305,956	36,451	35,867
Railroad Oversight Responsibilities	267,530	326,714	38,090	38,301
Certification Card	26,832	32,289	3,820	3,785
Petitions and Hearings	8,198	9,797	1,167	1,149
Government Administrative Cost	1,208,191	1,361,239	172,019	159,579
Total	5,345,589	6,139,877	761,092	719,781

This rule is expected to reduce the likelihood of an accident occurring due to dispatcher error. FRA has analyzed accidents over the past five years to categorize those where dispatcher training and certification would have impacted the accident. FRA then estimated benefits based on that analysis.

The following table shows the estimated 10-year quantifiable benefits of the proposed rule. The total 10-year estimated benefits would be \$0.8 million (PV, 7%) and annualized benefits would be \$0.1 million (PV, 7%).

Total 10-Year Discounted Benefits (2020 Dollars)

Present Value 7% (\$)	Present Value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
785,599	918,450	111,852	107,670

This proposed rule would also provide unquantifiable benefits. FRA has quantified the monetary impact from accidents reported on FRA accident forms. However, some accident costs are not required to be reported on FRA accident forms (e.g., environmental impact). That impact may account for additional benefits not quantified in this analysis. If these costs were realized, accidents affected by this proposed rulemaking could have much greater economic impact than the quantitative benefit estimates provided here.

There is also a chance of a high impact event due to a dispatcher error. This could involve fatalities, injuries, and environmental damage, as well as impacting railroads,

communities, and the public. FRA has not estimated the likelihood of such an accident, but this proposed rule is expected to reduce the risk that an accident of that magnitude.

II. Legal Authority

Pursuant to the Rail Safety Improvement Act of 2008, Public Law No. 110-432, sec. 402, 122 Stat. 4848, 4884 (Oct. 16, 2008) (hereinafter “RSIA”), the Secretary of Transportation (Secretary) was required to submit a report to Congress addressing whether certification of certain crafts or classes of employees, including dispatchers, was necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.³ If the Secretary determined it was necessary to require the certification of certain crafts or classes of employees to reduce the number and rate of accidents and incidents or to improve railroad safety, section 402 of the RSIA stated the Secretary may prescribe such regulations. The Secretary delegated this authority to the Federal Railroad Administrator. 49 CFR 1.89. In response to the RSIA, the Secretary submitted a report to Congress on November 4, 2015,⁴ stating that, based on FRA’s preliminary research, dispatchers and signal employees were potentially the most viable candidate railroad crafts for certification. Based on the analysis in Section III below, the Federal Railroad Administrator has determined that it is necessary to require the certification of railroad dispatchers to improve railroad safety.

III. Background

1. Roles and Responsibilities of Dispatchers

Railroad dispatchers play an integral role in railroad safety and operations. They are responsible for allocating and assigning track use, ensuring that trains are routed safely and efficiently, and ensuring the safety of personnel working on and around

³ See also 49 U.S.C. 20103 (providing FRA’s general authority to “prescribe regulations and issues orders for every area of railroad safety”).

⁴ www.regulations.gov/document/FRA-2022-0019-0001.

railroad track. These are cognitively complex tasks that require integrating multiple sources of information (e.g., information from train schedules, computer displays of current track state, radio communication with various personnel such as locomotive engineers, and in some cases, projecting into the future (e.g., estimating when the train will arrive)); and balancing multiple demands placed on track use (e.g., balancing the need for maintenance-of-way workers to have time to work on the track with the need to make sure that the track will be clear when a train is anticipated to arrive). Some of the main tasks⁵ dispatchers perform involve: operation monitoring (monitoring a computerized train dispatching model board); information collection and data entry (collecting information about slow orders and any blocking protection required by railroad workers on the track); communication (playing an important role in roadway worker planning and protection); emergency response (working to limit the damage to human life and property during an emergency); and knowledge of territory (knowing the specific characteristics of the territory assigned to them).

Over the past 5 to 10 years, the job of a railroad dispatcher has become more complex and demanding. The number of dispatchers has decreased over the years, and dispatcher territory is expanding due to this decrease. Also, with the advancement of Positive Train Control (PTC), dispatchers must understand the interface between the computer-aided dispatching system and the train control system, with respect to the safe movement of trains and other on-track equipment. Dispatchers need to understand the operating rules applicable to the train control system, including granting permission for movement and protection of roadway workers; unequipped trains; trains with failed or

⁵ As part of a contract with FRA, Foster-Miller, Inc., conducted research to develop a tool for assessing railroad dispatcher task load. Task load is defined as the average time demanded of a dispatcher in carrying out all job-related tasks at a particular desk, over a specified period of time (e.g., one shift). Stephen J. Reinach, Toward the Development of a Performance Model of Railroad Dispatching 2042-46 (Proceedings of the Human Factors and Ergonomics Society 50th Annual Meeting, 2006). A copy of this report can be found at <https://railroads.dot.gov/elibrary/proceedings-human-factors-and-ergonomics-society-50th-annual-meeting-2006>.

cut-out train control onboard systems; control system fails; and providing for safe operations under the alternative method of operation. The availability of affordable computer systems has made computer-aided dispatching (CAD) feasible for many railroads. The improved communications systems led to the acceptance of radio transmitted directives in place of the traditional paper train orders that had been previously used. These changes in communications and signal technology have also resulted in the closing of block towers, eliminating the job of tower operator, a job that was often on the career path to becoming a dispatcher.

Today, dispatchers are likely to use multiple computer screens and electronic equipment, in addition to a communications system. However, a short line railroad may still use hand-written or verbal authorities to move trains across dark (unsignalled) territory. The industry's adoption of new dispatching technology, changes in operating rules and methods of operation, and railroad industry restructuring all have potential safety consequences. Additionally, excessive workloads and increases in occupational stress could result from any of these factors. The role of the dispatcher would also significantly increase with a possible increase in one-person crew operations, as more vigilance and attention will be needed to cover these operations. Additional one-person crew operations would introduce increased workloads as the dispatcher will be the direct "lifeline" to the multiple one-person operations in a given assigned territory.

2. FRA History of Certification

On January 4, 1987, an Amtrak train collided with a Conrail train in Chase, Maryland, resulting in 16 deaths and 174 injuries. At the time, it was the deadliest train accident in Amtrak's history. The subsequent investigation by the National Transportation Safety Board concluded that the probable cause of the accident was the

impairment of the Conrail engineer who was under the influence of marijuana at the time of the collision.⁶

Following this accident, Congress passed the Rail Safety Improvement Act of 1988, Public Law No. 100-342, 4, 102 Stat. 624, 625 (1988), which instructed the Secretary of Transportation (Secretary) to “issue such rules, regulations, orders, and standards as may be necessary to establish a program requiring the licensing or certification of any operator of a locomotive, including any locomotive engineer.” On June 19, 1991, FRA published a final rule establishing a certification system for locomotive engineers and requiring railroads to ensure that they only certify individuals who met minimum qualification standards.⁷ In order to minimize governmental intervention, FRA opted for a certification system where the railroads issue the certificates as opposed to a government-run licensing system. This final rule, published in 49 CFR part 240 (part 240), created certification requirements for engineers that addressed various areas, including vision and hearing acuity; training, knowledge, and performance skills; and prior safety conduct.

Seventeen years later, Congress passed the Rail Safety Improvement Act of 2008, Public Law No. 110-432, 402, 122 Stat. 4848, 4884 (2008) (hereinafter “RSIA”), which mandated the creation of a certification system for conductors. On November 9, 2011, FRA published a final rule requiring railroads to have certification programs for conductors and to ensure that all certified conductors satisfy minimum Federal safety standards.⁸ The conductor certification rule, published in 49 CFR part 242 (Part 242), was largely modeled after Part 240 with some deviations based on the different job

⁶ Railroad Accident Report: Rear-end Collision of Amtrak Passenger Train 94, the Colonial and Consolidated Rail Corporation Freight Train ENS-121, on the Northeast Corridor, Chase, Maryland, January 4, 1987 144 (Nat’l Transp. Safety Bd. 1988).

⁷ 56 FR 28227 (June 19, 1991).

⁸ 76 FR 69801 (Nov. 9, 2011).

classifications. Part 242 also included some organizational improvements which made the regulation more streamlined than Part 240.

3. Statutory Background for Dispatcher Certification

In addition to requiring certification for conductors, the RSIA required the Secretary to submit a report to Congress addressing whether certain other railroad crafts or classes of employees would benefit from certification. Specifically, section 402(b) of the RSIA requires that the Secretary issue a report to Congress “about whether the certification of certain crafts or classes of railroad carrier or railroad carrier contractor or subcontractor employees is necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.” As part of that report, section 402(c) specifically requires the Secretary to consider dispatchers as one of the railroad crafts for certification.

After identifying a railroad craft or class for which certification is necessary, pursuant to the report to Congress discussed above, section 402(d) authorizes the Secretary to “prescribe regulations requiring the certification of certain crafts or classes of employees that the Secretary determines . . . are necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.”

4. Report to Congress

On November 4, 2015, the Secretary submitted the report to Congress required under the RSIA. The report stated that, based on FRA’s preliminary research, dispatchers and signal repair employees were the most viable candidates for certification. In reaching this determination with respect to dispatchers, the Secretary cited a variety of factors.

The report noted that dispatchers perform safety-sensitive work as shown by dispatchers being covered under the hours-of-service laws; and they are subject to regular and pre-employment random drug and alcohol testing. In 2012 and 2013, dispatchers had the highest pre-employment positive drug testing rate among all crafts. Annual drug and

alcohol testing data submitted to FRA in 2012 and 2013 showed a 0.68-percent random positive drug testing rate and a 0.79-percent pre-employment positive drug testing rate for dispatch employees compared to a 0.48-percent random positive drug testing rate and a 0.46-percent pre-employment positive drug testing rate for signal employees; and a 0.49-percent random positive drug testing rate and a 0.55-percent pre-employment positive drug testing rate for train and engine service employees.⁹ The report noted that 49 CFR parts 240 and 242 require a five-year alcohol and drug background check as well as disqualification of employees for specified alcohol and drug test violations and for refusing such testing. If such requirements were included in a dispatcher certification program, it could help prevent dispatchers with active substance abuse disorders from “job hopping” from one employer to another and reduce the safety risk of having individuals with untreated substance abuse disorders working as dispatchers.

Another important factor in the report was the complicated nature of the work dispatchers perform to ensure the safety and efficiency of railroad operations. Dispatchers are responsible for allocating and assigning main track use to trains from their own employer as well as trains from other railroads. They are also responsible for the safety of roadway workers working on or near track. The report summarized the demanding nature of dispatching by stating that it entails performing cognitively complex tasks that require rapid decision making, projecting into the future, and balancing numerous demands on track use.

Additionally, the report cited a “great amount of turnover” in the nationwide train dispatching workforce, resulting in a less experienced workforce, as further support for requiring certification. Finally, the report found that, with the exception of train and

⁹ Testing results submitted to FRA in 2020 and 2021 showed a 0.94-percent random violation rate (drug and alcohol positives and refusals) rate and a 0.85-percent pre-employment violation rate for dispatch employees compared to a 0.81-percent random violation rate and a 0.79-percent pre-employment violation rate for signal employees; and a 0.49-percent random positive drug testing rate and a 0.55-percent pre-employment positive drug testing rate for train and engine service employees.

engine crews, no function of railroad operations is more critical to safety than dispatching. The accumulation of these factors led to the report's conclusion that dispatching was a potentially viable candidate for certification.

5. RSAC Working Group

In March 1996, FRA established the Railroad Safety Advisory Committee (RSAC), which provides a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency's major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task.

On April 21, 2017, a task statement regarding certification of dispatchers was presented to the RSAC by email, but no vote was taken. On April 24, 2019, the RSAC accepted a task (No. 19-02) entitled "Certification of Train Dispatchers."¹⁰ The purpose of the task was "[t]o consider whether rail safety would be enhanced by developing guidance, voluntary standards, and/or draft regulatory language for the certification of train dispatchers." The task called for the RSAC Train Dispatcher Certification Working Group (Working Group) to perform the following:

- Review critical tasks performed by dispatching employees for safe train operations, particularly with the introduction of PTC technology.
- Review training, duration, content, and methodology for new hire and continuing education.

¹⁰ At the same meeting, the RSAC also accepted a task (No. 19-03) titled "Certification of Railroad Signal Employees." A separate RSAC Working Group was formed to address this task, and FRA plans to issue a related proposed rule that would establish certification requirements for signal employees.

-Review background checks designed to prevent dispatching employees with active substance abuse disorders from “job-hopping” from one employer to another.

The task statement also asked the Working Group to address the following issues, if appropriate:

-What requirements for training and experience are appropriate?

-What classifications of dispatchers should be recognized, if any?

-To what extent do existing requirements and procedures for certification of locomotive engineers and conductor certification provide a model for dispatcher certification?

-What types of unsafe conduct should affect a train dispatcher’s certification status?

-Do the existing locomotive engineer and conductor certifications provide an adequate model for handling appeals from decertification decisions of the railroads?

The Working Group, which included representatives from the Association of American Railroads (AAR), American Public Transportation Association, American Short Line and Regional Railroad Association (ASLRRA), American Train Dispatchers Association, Brotherhood of Railroad Signalmen, SMART Transportation, Commuter Rail Coalition, and National Railroad Construction & Maintenance Association, held its first and only meeting on September 4, 2019 in Washington, DC. At this meeting, the Working Group reviewed the task statement from the RSAC, discussed some of the safety-critical tasks performed by dispatchers, and debated whether certification of dispatchers would be beneficial to railroad safety. At the end of the meeting, action items were assigned and the next meeting was tentatively scheduled for January 2020.

However, on December 16, 2019, the presidents of the American Train Dispatchers Association, the Brotherhood of Railroad Signalmen, and the International Brotherhood of Electrical Workers (collectively the “Unions”) sent a letter to the FRA

Administrator requesting that this RSAC task be withdrawn from consideration at this time. The letter stated the Unions were currently involved in numerous activities and were not able to give the task proper attention. AAR and ASLRRA advised the Unions that they were not opposed to this request. In response to this letter, FRA withdrew this task from the RSAC, and the Working Group became inactive.

6. Public Outreach

In 2021, FRA revisited the issue of establishing certification requirements for dispatchers. The agency assembled subject matter experts from FRA, the American Train Dispatchers Association (ATDA), the International Brotherhood of Electrical Workers (IBEW), and the Brotherhood of Railroad Signalmen to exchange facts and information regarding the tasks performed by dispatchers. Those parties met virtually several times between May 5, 2021 and June 30, 2021.

As part of FRA's outreach, a list of tasks performed by dispatchers was developed. These tasks generally involved: track authorities; mandatory directives; track worker protection; emergency response coordination; or incident management. FRA reviewed each task to determine whether correctly performing the task was critical to railroad safety; what were the potential consequences if errors were made while performing the task; and whether there were any recent examples of issues or concerns with respect to the task. After performing this analysis, FRA concluded that the vast majority of tasks performed by dispatchers (80-90% of the listed tasks) were critical to railroad safety with potentially catastrophic consequences, such as accidents, injuries, and/or deaths, if the tasks were not performed properly. In addition, because dispatchers provide incident management and emergency response coordination, FRA concluded that by properly performing their tasks, dispatchers can help reduce the consequences of accidents and mitigate injuries.

During FRA's outreach, the benefits of certification based on the experience of stakeholders with engineer and conductor certification under 49 CFR parts 240 and 242 were also discussed. Some of the main benefits of certification that were identified included:

- Creating a minimum standard for training to ensure that the training encompasses all skills and proficiencies necessary to properly perform all safety-related dispatcher functions;

- Establishing a record of safety compliance that will follow a dispatcher if they wish to become certified by another railroad and that can be used to review a dispatcher's performance and potential training needs;

- Requiring certain safety checks, such as identifying active substance abuse disorders, that can minimize the risks posed by job hopping; and

- Establishing a system for individuals to dispute a railroad's decision to deny or revoke certification with the aim of creating a fair and consistent process for all parties.

Further, some parties noted that they had witnessed industry trends to reduce the length and level of training for dispatchers which would make certification even more beneficial. Based on these meetings, FRA concluded that requiring certification for dispatchers would be an important tool to ensure dispatchers are adequately trained and qualified; have a documented record of performance; and are not able to job hop without a new employer having knowledge of the dispatcher's safety performance record.

Following this initial outreach, FRA held a follow-up conversation with ATDA and IBEW, on March 3, 2022, and individuals from ATDA and IBEW informed FRA of elements that they believe would be beneficial in a dispatcher certification program. During this conversation, which was held in videoconference format, FRA asked the attendees to provide individualized feedback on how similar or different a

dispatcher certification rule should be to FRA's locomotive engineer and conductor certification rules found in 49 CFR parts 240 and 242.

FRA heard that the agency needs to ensure that comprehensive training is provided to dispatchers as the current training is inadequate. FRA also heard that railroads are not providing enough training on new technology and in some cases, training only consists of a PowerPoint presentation or watching a video. It was also noted that dispatchers are often told to ask their managers if they have questions, but managers are not always knowledgeable about the craft and often do not have sufficient expertise to answer such questions.

On March 7, 2022, FRA had a conversation with the railroad industry, including the Norfolk Southern Corporation (NS), AAR, and ASLRRA. During this conversation, which was conducted in a videoconference format, FRA also asked for individualized feedback on how FRA's locomotive engineer and conductor certification regulations in 49 CFR parts 240 and 242 could be improved upon with respect to dispatcher certification. Specifically, FRA asked for feedback on any regulatory provisions in 49 CFR parts 240 and 242 that, in their experience, may have been difficult to implement, as well as whether FRA should explore any changes to these regulatory provisions.

AAR expressed opposition to FRA's proposal to issue regulations requiring certification of dispatchers arguing that there was not a safety benefit to certification. In addition, NS questioned the need for certification regulations in the absence of any identified gaps in coverage by existing railroad training programs. ASLRRA expressed concern that FRA's proposal to issue regulations requiring dispatcher certification would result in a large paperwork burden with little benefit.

After this conversation, FRA provided a short list of written questions to AAR and ASLRRA. While AAR did not provide additional feedback in response to FRA's list

of questions, ASLRRA responded to FRA's list of written questions by email on April 13, 2022, a copy of which has been placed in the docket.¹¹

On March 10, 2022, FRA staff had a follow-up conversation with ATDA and IBEW to receive information on the types of errors and operating practice violations that should result in a railroad revoking a dispatcher's certification. During this conversation, which was conducted in a video conference format, FRA heard that a dispatcher's certification should not be revoked during an operations test, and that a person training a dispatcher should not have their certification revoked if a person they are training commits a revocable offense, as long as the trainer took appropriate action. However, a list of prospective revocable events was not generated during this meeting.

7. Contractors

FRA considered whether railroad contractors (and subcontractors) should be authorized to certify their employees. FRA did not, however, include that option in this proposed rule. Instead, consistent with FRA's engineer and conductor certification regulations, this proposed rule requires railroads to develop and submit certification programs to FRA for approval and then implement their FRA-approved certification programs. FRA is proposing to adopt this approach because railroads are ultimately held responsible for the actions (or failure to act) of their employees, contractors, and subcontractors when engaged in railroad operations.

FRA acknowledges that dispatcher functions are increasingly being contracted out by railroads to companies that specialize in this work. However, railroads are most knowledgeable about the unique characteristics of their territories. Therefore, railroads are best suited to develop certification programs that are needed to ensure that all employees responsible for allocating and assigning main track use, routing trains safely

¹¹ A record of public contact summarizing this meeting has been posted in the rulemaking docket at: <https://www.regulations.gov/document/FRA-2022-0019-0002>.

and efficiently, and ensuring the safety of roadway workers who are working on or near the railroad tracks have been properly trained and certified on: a) the railroad's rules and practices for the safe movement of trains; b) physical characteristics of the territory for which the employee will be working as a dispatcher; and c) the dispatching systems and technology used by that railroad. In addition, by keeping certification programs in-house, railroads can implement quality control measures to ensure that their FRA-approved certification programs are being implemented properly.

Nonetheless, FRA is soliciting comment on the approach adopted in this proposed rule, which would require railroads to develop and implement FRA-approved dispatcher certification programs. To ease any potential burden, especially on Class III railroads, the proposed rule would allow all railroads to choose between conducting the training or using a training program conducted by a third-party, which would be adopted and ratified by the railroad. In addition, contractors that employ dispatchers could help railroads comply with the requirements in this proposed rule by providing information about their dispatchers' compliance with some of the proposed regulatory requirements. For example, contractors could provide information about their dispatchers' compliance with the vision and hearing acuity requirements in the proposed rule. Under this proposed rule, however, railroads would ultimately be liable for ensuring that only certified dispatchers are permitted to perform dispatching tasks on their networks.

8. Interaction with Other FRA Regulations

While developing this proposed rule, FRA has been mindful of other regulations that may touch upon topics covered in this proposed rule, including FRA's training, qualification, and oversight regulations in 49 CFR part 243 (part 243); railroad safety risk reduction programs (SSP/RRP) in 49 CFR parts 270 and 271 (part 270 and part 271); and fatigue risk management programs (FRMP) in parts 270 and 271. However, FRA finds that this proposed rule would complement, rather than duplicate, those regulations.

Dispatchers are currently included in part 243's requirements for training, qualification, and oversight for safety-related railroad employees. However, part 243 does not require employees to undergo a performance skill evaluation conducted by a qualified instructor to verify adequate knowledge transfer. Therefore, even though railroads (and third-party entities that employ dispatchers) are required to have training programs in place for dispatchers, railroads are not required to have effective processes in place to require prospective dispatchers to exhibit the extent to which they have developed the necessary skills to serve as an effective dispatcher.

Part 243 also does not require railroads to have formal processes in place for promptly removing dispatchers from service if they violate one or more basic regulatory standards that could have a significant negative impact on the safety of rail operations. FRA's proposed dispatcher certification regulatory requirements have been drafted to help address this void, as well as prevent dispatchers who have been fired for committing one or more of the revocable events discussed in the proposed rule from "job hopping" and quickly resuming safety-sensitive service at a different railroad that is unaware of the dispatcher's prior violation(s) of FRA's rail safety requirements.

As codified in parts 270 and 271, FRA requires Class I railroads, railroads with inadequate safety performance, and passenger rail operations to implement railroad safety risk reduction programs. A railroad safety risk reduction program is a comprehensive, system-oriented approach to safety that determines an operation's level of risk by identifying and analyzing identified hazards and developing strategies to mitigate risks associated with those hazards. In this background, FRA is using the term "railroad safety risk reduction programs" to include both a "system safety program" (SSP) that is required for certain

passenger rail operations¹² and a “risk reduction program” (RRP) that is required for a limited number of other rail operations.¹³

Although a railroad safety risk reduction program might address a railroad’s safety hazards and risks associated with its dispatchers, the framework established by these programs neither directly addresses the risks associated with dispatching nor establishes an industry-wide approach.

First, not every railroad is required to have a railroad safety risk reduction program. Indeed, FRA estimates that fewer than 100 railroads (out of approximately 750 under FRA’s jurisdiction) will be required to develop a railroad safety risk reduction program over the next 10 years.

Second, even if a railroad is required to have a railroad safety risk reduction program through which it identifies the risks associated with dispatching, the railroad may decide not to implement mitigations to eliminate or reduce those specific risks. Parts 270 and 271 permit railroads to prioritize risks.¹⁴ Whether a railroad that is required to have a program mitigates risks associated with dispatching will depend on how the railroad prioritizes risks for mitigation and how effectively that mitigation would promote continuous safety improvement compared to mitigation of other identified hazards and risks. Thus, even if aspects of dispatching are identified as a risk, a railroad may not implement mitigations to eliminate or reduce that risk.

Accordingly, while the SSP/RRP requirements may complement this proposed rule, they do not address the need for FRA and the railroads to consider and address the safety risks of dispatching across the entire industry.

¹² 49 CFR 270.3 (requiring the application of the system safety rule to certain passenger rail operations).

¹³ 49 CFR 271.3 (requiring the application of the risk reduction program rule to certain rail operations).

¹⁴ See e.g., 49 CFR 270.5 (definition of “risk-based hazard management”) and 271.103(b)(3).

With respect to FRMPs,¹⁵ an FRMP is a comprehensive, system-oriented approach to safety in which a railroad determines its fatigue risk by identifying and analyzing applicable hazards, and developing plans to mitigate, if not eliminate, those risks. Like the SSP/RRP rules, the FRMP rule is part of FRA's continual efforts to improve rail safety and will satisfy the statutory mandate of Section 103 of the Rail Safety Improvement Act of 2008.¹⁶

Like the SSP/RRP requirements, there is no guarantee that any railroad covered by the regulation will use an FRMP to address dispatching issues. As with the SSP/RRP rules, a covered railroad must identify fatigue hazards, assess the risks associated with those fatigue hazards, and prioritize those risks for mitigation purposes. It is possible that other fatigue risks, not associated with dispatching, might rank higher, in which case the risk associated with dispatching might not be promptly mitigated. Further, because the FRMP requirements would apply only to those railroads required to comply with the SSP/RRP requirements, an FRMP would not be required of every railroad that performs dispatch tasks. Thus, like the SSP/RRP rules, this proposed rule is complementary to the FRMP final rule and is not duplicative.

IV. Section-by-Section Analysis

Subpart A – General

Subpart A of the proposed rule contains general provisions, including a formal statement of the proposed rule's purpose and scope. The subpart also provides that this proposed rule does not constrain the ability of a railroad to prescribe additional or more stringent requirements for its dispatchers that are not inconsistent with this proposed rule.

Section 245.1 Purpose and Scope.

This section, derived from 49 CFR 240.1 and 242.1, indicates that the purpose of the proposed rule is to ensure that only those persons who meet minimum Federal safety

¹⁵ On June 13, 2022, FRA published a final rule adding a FRMP to the railroad safety risk reduction program requirements in Parts 270 and 271. 85 FR 83484.

¹⁶ Codified at 49 U.S.C. 20156.

standards serve as dispatchers, to reduce the rate and number of accidents and incidents, and to improve railroad safety.

Even though a person may have a job title other than dispatcher, the requirements of this proposed rule would apply to that person if they meet the definition of “dispatcher.” The definition of “dispatcher,” and an explanation of who is covered by the definition, are discussed in more detail in the section-by-section analysis for § 245.7, below.

Section 245.3 Application and Responsibility for Compliance.

The extent of FRA’s jurisdiction, and the agency’s exercise of that jurisdiction, is well-established. *See* 49 CFR part 209, appendix A. This proposed application and responsibility for compliance section is consistent with FRA’s *Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws in appendix A to 49 CFR part 209*.

This section, derived from 49 CFR 240.3 and 242.3, provides that the proposed rule would apply to all railroads with four exceptions. Paragraph (a)(1) of this section notes that this proposed rule would not apply to railroads that do not perform any dispatch tasks. In paragraph (a)(2), FRA proposes to exempt operations that occur within the confines of industrial installations commonly referred to as “plant railroads” and typified by operations such as those in steel mills that do not go beyond the plant’s boundaries and that do not involve the switching of rail cars for entities other than themselves. Further explanation of what is meant by the term “plant railroad” is provided in the section-by-section analysis for § 245.7.

Paragraph (a)(3) of this section excludes “tourist, scenic, historic, and excursion operations that are not part of the general railroad system of transportation” (as defined in § 245.7) from compliance with this rule. Excluding these types of operations from this

rule is consistent with FRA's jurisdictional policy that excludes these operations from all but a limited number of Federal safety laws, regulations, and orders.

The final proposed exclusion covers rapid transit operations in an urban area that are not connected to the general railroad system of transportation. It should, however, be noted that FRA exercises jurisdiction over some rapid transit type operations, given their links to the general railroad system of transportation, such as rapid transit operations conducted on track used for freight, intercity passenger, or commuter passenger railroad operation, during a block of time during which a general system railroad is not operating (temporal separation). Thus, this proposed rule would apply to persons who perform dispatch tasks for those rapid transit type operations.

Paragraph (b) is intended to clarify that any person, as defined in § 245.7, (including a railroad employee, employee of a railroad contractor, or employee of a railroad subcontractor) who performs a function required by this part will be held responsible for compliance. Therefore, this proposed regulation would cover all dispatchers regardless of whether they are employed by a railroad or a contractor. Covering employees of both railroads and contractors is consistent with other FRA regulations (such as FRA's training regulations in 49 CFR part 243) and the general trend in the railroad industry. In many instances, employees performing dispatch tasks for a railroad may be employed by a company other than the railroad upon which the person is working. In the interest of railroad safety, it is vital that all dispatchers are properly trained and qualified regardless of whether they are employed by a railroad or a contractor.

Section 245.5 Effect and Construction.

This section is derived from 49 CFR 240.5 and 242.5. Paragraph (a) addresses the relationship of this proposed rule to preexisting legal relationships. Paragraph (b)

states that FRA does not intend to alter the authority of a railroad to initiate disciplinary sanctions against its employees by issuance of this proposed rule.

Paragraph (c) of this section is intended to note that, as a general matter, FRA does not intend to create or prohibit the right to “flowback” or take a position on whether “flowback” is desirable. The term “flowback” has been used in the industry to describe a situation where an employee leaves their current position to return to a previously held position or craft. The reasons for reverting back to the previous craft may derive from personal choice or a less voluntary nature (such as downsizing). Many collective bargaining agreements address the issue of flowback. However, paragraph (c) must be read in conjunction with § 245.213, which limits flowback in certain situations (i.e., when a certificate is revoked due to an alcohol or drug violation).

Paragraph (d) of this section addresses employee rights. The proposed rule would explicitly preserve any remedy already available to the person and would not create any new entitlements.

Section 245.7 Definitions.

This section, derived from 49 CFR 240.7 and 242.7, defines a number of terms that have specific meaning in this proposed part. A few of these terms have definitions that are similar to, but may not exactly mirror, definitions used elsewhere in this chapter.

Dispatch

FRA proposes to use the definition of “dispatch” found in 49 CFR 241.5. This definition sets the limits of what constitutes a dispatcher and provides examples of the types of activities FRA intends to cover and not cover under this definition. Under this definition, the function that the individual is performing determines whether a person is dispatching. Factors such as an individual’s job title, location, and whether the individual is employed by a railroad, are irrelevant to the determination of whether the individual is dispatching. Furthermore, FRA does not intend for yardmasters, as a job category, to fall

within the scope of this definition. Yardmasters are only covered by this part when they are performing dispatching functions.

Paragraph (1)(i) of the definition gives specific examples of the types of functions that an individual would perform in order to be considered dispatching. In particular, FRA intends that anyone controlling the movement of on-track equipment requiring a power brake test under 49 CFR parts 232 or 238, would be considered dispatching and, therefore, would fall within the scope of the rule. Another type of movement that FRA intends to include is the movement of certain other on-track equipment, such as specialized maintenance-of-way equipment, that is not subject to the power brake regulations. However, as expressed in proposed paragraph (2)(iii), FRA intends to exclude movements of on-track equipment used in the process of sorting and grouping rail cars inside a railroad yard in order to assemble or disassemble a train.

Paragraph (1)(i) also explicitly notes two methods of controlling movements that fall within the scope of the definition. The first method that FRA considers dispatching is controlling movements by the issuance of a written or verbal authority or permission that affects a railroad operation, such as through movement authorities and speed restrictions, and includes the following: Track Warrants, Track Bulletins, Track and Time Authority, Direct Traffic Control Authorities, and any other methods of conveying authority for trains and engines to operate on a main track, controlled siding, or other track controlled by a dispatcher.

The second method that falls within the scope of the definition of “dispatch” is to control a movement “by establishing a route through the use of a signal or train control system but not merely by aligning or realigning a switch.” This provision makes clear that the act of aligning or realigning a switch alone is not sufficient to constitute dispatching. In order to constitute dispatching under this part, aligning or realigning a

switch must be accompanied by the act of setting a signal authorizing movement over a track segment.

Paragraph (1)(ii) of the definition of “dispatch” clarifies that those railroad employees who issue an authority for either a roadway worker or stationary on-track equipment, or both, to occupy a certain stretch of track while performing repairs, inspections, etc., will also be covered by this rule. FRA included this section to distinguish this activity from that of authorizing movement of trains or other on-track equipment onto track, which is covered by paragraph (1)(i) above.

Paragraph (1)(iii) of the definition of “dispatch” states another function of a dispatcher, which is to issue an authority for working limits to a roadway worker.

Finally, paragraph (2) of the definition of “dispatch” clarifies that the term excludes several types of activities. Paragraph (2) limits the exclusions, however, to personnel in the field. Paragraph (2)(i) specifically excludes from the scope of the definition the carrying out of a written or verbal authority or permission or an authority for working limits. As further clarification, paragraph (2)(i) notes two examples of activities that would fall under the exclusion, provided they were carried out by field personnel: initiating an interlocking timing device and authorizing a train to enter working limits. Paragraph (2)(ii) specifically excludes from the scope of the definition the operation by field personnel of a function of a signal system intended to be used by those field personnel, such as initiating an interlocking timing device.

Drug

Consistent with parts 240 and 242, FRA proposes to define “drug” as any substance (other than alcohol) that has known mind- or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances. This term is intended to refer to substances that have a significant potential for abuse and/or dependence. Normal ingestion of caffeine in

beverages and use of nicotine from tobacco products, even though involving some degree of habituation or dependence, are not intended to be included within the definition.

Person

In this proposed part, *person* takes on the same meaning as it does in FRA's other safety rules. The term means "an entity of any type covered under 1 U.S.C. 1" and the definition goes into detail regarding the types of people and entities that are covered.

Plant railroad

FRA proposes a definition of *plant railroad* consistent with FRA's longstanding policy. See 49 CFR part 209, app. A.

Substance Abuse Disorder

Consistent with parts 240 and 242, the term "substance abuse disorder" is defined as a psychological or physical dependence on alcohol or a drug, or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation.

This proposed definition would include drug and alcohol users who engage in abuse patterns which result in ongoing safety risks and violations.

A substance abuse disorder is "active" within the meaning of this proposed rule if the person: (1) is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter; or (2) has failed to successfully complete primary treatment or successfully participate in aftercare as directed by a Substance Abuse Professional (SAP) or Drug and Alcohol Counselor (DAC).

Section 245.9 Waivers.

This section, derived from 49 CFR 240.9 and 242.9, provides the proposed requirements for a person seeking a waiver of any section of this proposed rule.

Section 245.11 Penalties and Consequences for Noncompliance.

This section, derived from 49 CFR 240.11 and 242.11, explains that FRA may impose civil penalties on any person, including a railroad or an independent contractor or subcontractor providing goods or services to a railroad, that violates any requirement of this proposed rule. Any person who violates a requirement of this proposed rule may be subject to civil penalties between the minimum and maximum amounts authorized by statute and adjusted for inflation per violation. Individuals may be subject to penalties for willful violations only. Where a pattern of repeated violations, or a grossly negligent violation creates an imminent hazard of death or injury, or causes death or injury, an aggravated maximum penalty may be assessed.¹⁷ In addition, each day a violation continues constitutes a separate offense. Finally, a person may be subject to criminal penalties under 49 U.S.C. 21311 for knowingly and willfully falsifying reports required by these proposed regulations.

Consistent with FRA's final rule regarding the removal of civil penalty schedules from the CFR (84 FR 23730 (May 23, 2019)), FRA will not publish a civil penalty schedule for this rule in the CFR, but plans to publish a civil penalty schedule on its website. Penalty schedules are statements of agency policy, thus notice and comment are not required prior to their issuance, nor are they required to be published in the CFR. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless, commenters are invited to suggest the types of actions or omissions under each regulatory section that would subject a person to the assessment of a civil penalty. Commenters are also invited to recommend what penalty amounts may be appropriate, based upon the relative seriousness of each type of violation.

Subpart B – Program and Eligibility Requirements

Section 245.101 Certification Program Required.

¹⁷ Please visit FRA's website for the current aggravated maximum penalty amount at <https://railroads.dot.gov/>.

This section, derived from 49 CFR 240.101 and 242.101, would require railroads to have written certification programs comprised of at least seven elements, each of which comports with specific regulatory provisions in the proposed rule related to that element.

Section 245.103 FRA Review of Certification Programs.

This proposed section, derived from 49 CFR 240.103 and 242.103, describes the process for the submission and review of dispatcher certification programs. Paragraph (a) of this section would only apply to railroads that have existing dispatching operations on the effective date of the final rule and provides the deadlines for when these railroads would be required to submit their certification programs to FRA. The submission schedule would require Class I railroads and commuter service railroads to submit their programs earlier than Class II railroads, Class III railroads, and railroads not otherwise classified. The separate deadlines would help space out the initial influx of programs FRA will receive after the final rule goes into effect, to allow FRA to issue approval and disapproval decisions in a more timely manner. FRA also presumes that, in general, Class I railroads and commuter service railroads will have more resources to devote to creating these programs and will be better positioned to create and draft them more quickly.

Paragraph (b) of this section would only apply to railroads that do not have existing dispatching operations on the effective date of the final rule. If such railroads wish to begin dispatching operations, they would be required to submit their program to FRA, and FRA must approve their program, before they begin dispatching operations.

Paragraph (c) of this section provides that railroads would submit their programs and their requests for approval (which are described in greater detail in § 245.107(a)) by uploading them to a secure document submission site. This will allow for more efficient processing and will significantly reduce the risk of a program submission getting lost.

FRA will need basic information from each railroad before setting up the user's account. In order to provide secure access, information regarding the points of contact is required. It is anticipated that FRA will be able to approve or disapprove all or part of a program and generate automated notifications by email to a railroad's points of contact.

FRA does not intend to develop a secure document submission site so that confidential materials are identified and not shared with the general public. This is because FRA does not expect the information in a program to be of such a confidential or proprietary nature, particularly since each railroad would be required to share the program submission, resubmission, or material modification all of its dispatchers as well as with the president of each labor organization that represents the railroad's certified dispatchers, and the programs will be available on FRA's web site. *See* § 245.103(d) and (j). Accordingly, FRA does not at this time believe it is necessary to develop a document submission system which addresses confidential materials.

When a railroad submits its certification program to FRA, paragraph (d) of this section requires the railroad to also submit a copy of the program and the request for approval to the president of each labor organization that represents the railroad's dispatchers and to all of the railroad's dispatchers that are subject to this part. The railroad's submission to FRA must include a statement affirming that it has provided a copy of the program and the request for approval to the president of each labor organization that represents the railroad's dispatchers and to all of the railroad's dispatchers that are subject to this part. In addition, the submission must include a list of the names and email addresses of each labor organization president who received a copy of the program. Paragraph (e) of this section provides instruction on who is allowed to comment on these programs. For dispatchers who are members of a labor union, any comments must be submitted by a designated representative. For dispatchers who are not members of a labor union, they can personally submit a comment on their railroad's

certification program. FRA anticipates that comments submitted under this process will assist the agency in determining whether a program conforms to the requirements set forth in this rule, and thus, FRA will not make a decision on a program until after the 45-day comment period in paragraph (e)(1) has passed.

Paragraph (f) of this section states FRA's aspirational goal to decide on whether to approve a program within 90 days of the date that the program is submitted. However, this is only a goal and not a deadline for the agency. Paragraph (f)(3) makes clear that if FRA is unable to issue a decision on the program within 90 days, the program is not considered approved on the 91st day. A certification program will not be approved until FRA issues a letter notifying the railroad that its program has been approved. While FRA will make every effort to issue approval and disapproval letters within 90 days, FRA recognizes that this will not always be possible. It may be especially difficult for FRA to meet this goal during the initial implementation of this rule when FRA expects to receive many certification programs within a relatively short period of time.

Paragraph (g) of this section addresses the process for railroads who wish to materially modify their previously approved programs. If a railroad wishes to materially modify its program, it must submit two documents to FRA: (1) a description of how it intends to modify its current program (this constitutes the request for approval required under § 245.107(a)); and (2) a copy of the modified program. Paragraph (g)(1) defines a "material modification" as a modification that "would affect the program's conformance with this part." This definition is taken from 49 CFR 240.103(h)(1) and 242.103(i)(1) and is intentionally broad to cover the innumerable modifications to a program that could be considered material. FRA recognizes that there may be a desire among some interested parties to have a more specific definition of "material modification" in the regulation. Thus, FRA welcomes any comments on suggested changes to the "material modification" definition.

Paragraph (g)(3) notes that the process for submission and review of material modifications mirrors the process for submission and review of initial certification programs. Railroads shall submit their material modifications to FRA in conformance with paragraph (c) of this section and shall send a copy of the material modification description and the modified program to all required parties referenced in paragraph (d) of this section. Certain interested parties may comment on the modification in conformance with paragraph (e) of this section, and FRA will issue a letter either approving or disapproving the material modification in conformance with paragraph (f) of this section. If FRA approves the material modification, the railroad can begin implementing the modification and the modified program will replace the original program. If FRA disapproves the material modification, the railroad cannot implement the modification, and the original program must remain in effect. If a railroad's material modification submission contains multiple modifications, FRA reserves the right to approve some modifications while disapproving other modifications. In such an instance, the railroad can only begin implementing those modifications that FRA has approved.

Paragraph (h) of this section describes the process to resubmit a program or material modification that was previously disapproved by FRA. Paragraph (h)(2) notes that the process for submission and review of resubmitted programs and material modifications mirrors the process for submission and review of initial certification programs. Railroads shall resubmit their initial programs or material modifications to FRA in conformance with paragraph (c) of this section and shall send a copy of the resubmitted program or material modification to all required parties referenced in paragraph (d) of this section. Certain interested parties may comment on the resubmitted program or material modification in conformance with paragraph (e) of this section and FRA will issue a letter either approving or disapproving the resubmitted program or material modification in conformance with paragraph (f) of this section.

Paragraph (h)(3) provides the deadlines, if any, for when a railroad must resubmit its program or material modification to FRA. Railroads with existing dispatching operations on the effective date of the final rule (legacy railroads), whose initial programs are disapproved by FRA, must resubmit their program within 30 days of the date FRA notified the railroad that its program was deficient. If a legacy railroad fails to resubmit its program within 30 days and continues its dispatching operations, FRA will determine the appropriate enforcement approach to achieve compliance, including civil penalties and/or an emergency order.

FRA believes a 30-day deadline is needed for legacy railroads because § 245.105(a) allows legacy railroads to continue dispatching operations while they await FRA approval of their programs. Thus, without a deadline, legacy railroads could purposely delay coming into compliance with this proposed rule by taking months or even years to resubmit their programs. In contrast, railroads that begin dispatching operations after the effective date of this proposed rule cannot begin such operations until FRA approves their program. Likewise, any railroad (both legacy and non-legacy) cannot implement a material modification to its program until FRA has approved the modification. Therefore, in these scenarios, FRA decided that a deadline is unnecessary because the railroads have every incentive to resubmit their programs or material modifications in a timely manner. However, while there is no FRA-imposed deadline in these scenarios, FRA still recommends that railroads provide their resubmissions within 30 days of being notified of deficiencies.

Paragraph (i) of this section acknowledges that FRA reserves the right to revisit a prior approval of a certification program. In certain circumstances, including an audit of a certification program, FRA may discover that it made an error when it previously approved a program. This paragraph allows FRA to rescind a prior approval while also providing the railroads with certain rights. Paragraph (i)(3) notes that the process for

submission and review of programs whose prior approval has been rescinded mirrors the process for submission and review of initial certification programs, and resubmission of initially disapproved programs. Railroads shall resubmit their programs to FRA in conformance with paragraph (c) of this section and they shall send a copy of the resubmitted program to all required parties referenced in paragraph (d) of this section. Certain interested parties may comment on the resubmitted program in conformance with paragraph (e) of this section and FRA will issue a letter either approving or disapproving the resubmitted program in conformance with paragraph (f) of this section.

Paragraphs (i)(6) and (7) allow for a grace period where a rescinded program may remain in effect for a certain period of time. However, once FRA approves a resubmitted program, the resubmitted program must replace the rescinded program. In addition, a rescinded program can no longer remain in effect if FRA has twice disapproved the railroad's resubmitted program. This latter scenario is best explained through an example: On February 10th, FRA notifies ABC Railroad (ABC) that FRA is rescinding its prior approval of its dispatcher certification program. On March 10th, ABC resubmits its program to FRA. On June 10th, FRA disapproves ABC's resubmitted program. On July 10th, ABC sends FRA its second resubmitted program. On October 10th, FRA issues a letter once again disapproving ABC's program. In this example, ABC's rescinded program could remain in effect between February 10th and October 10th. However, after October 10th, the rescinded program could no longer be in effect. If ABC continued to perform dispatching operations after October 10th, while it did not have an FRA-approved certification program, FRA could find that the railroad failed to implement a program. In such cases, FRA will determine the appropriate enforcement approach to achieve compliance, including civil penalties and/or an emergency order. In exercising its enforcement discretion, FRA may consider such factors as the number and extent of the

remaining deficiencies in the program and whether the railroad made good faith efforts to address the deficiencies in its resubmissions.

Finally, paragraph (j) of this section notes that the following documents will be available on FRA's website (railroads.dot.gov): (1) submitted programs and material modifications from the railroads; (2) any comments to the submissions from the railroads; and (3) the letters from FRA either approving or disapproving a program or a material modification. While parts 240 and 242 do not currently require the posting of these documents on FRA's website, the current practice, with respect to locomotive engineer and conductor certification programs, has been for FRA to post comments to a railroad's submission and FRA approval and disapproval letters on its website. FRA is proposing this paragraph (j) in an effort to make the review and approval process of dispatcher certification programs as transparent as possible.

Section 245.105 Implementation Schedule for Certification Programs.

This section, derived from 49 CFR 240.201 and 242.105, contains the timetable for the implementation of this proposed rule. Paragraph (a) of this section acknowledges that railroads with existing dispatching operations on the effective date of this proposed rule (legacy railroads) may continue their dispatching operations while they await FRA's approval of their certification programs. However, if FRA disapproves a legacy railroad's certification program on two occasions (the initial submission and the first resubmission), the railroad will no longer be in compliance with the rule if it continues its dispatching operations without an FRA-approved program. In such a scenario, FRA could find that the railroad has failed to implement a program and would determine the appropriate enforcement approach to achieve compliance, including civil penalties and/or an emergency order. In exercising this enforcement discretion, FRA may consider such factors as the number and extent of the remaining deficiencies in the program and whether the railroad made good faith efforts to comply with the requirements of the rule

through its submitted program. Paragraph (b) of this section provides that any non-legacy railroad (a railroad that did not have existing dispatching operations on the effective date of this proposed rule) may not commence dispatching operations until FRA has approved its dispatcher certification program.

Paragraphs (c) and (d) of this section require that railroads, in writing, designate as certified dispatchers all persons authorized by the railroad to perform the duties of a dispatcher as of the effective date of the final rule, or authorized between the effective date of the final rule and the date FRA approves the railroad's certification program. Railroads must also issue a certificate to each person they designate. This designation system is modeled after the system used when parts 240 and 242 first went into effect. This system allows such "legacy dispatchers" to obtain a certificate so that once their railroad's program is approved, they will be considered a "previously certified dispatcher" when it comes time for them to be recertified through the railroad's certification program. Therefore, the recertifying railroad will not have to provide legacy dispatchers with the kind of basic training that would be given to individuals with no dispatching experience. In other words, a person with 20 years of experience as a dispatcher most likely does not need to take a "Dispatching 101" course that goes over the basics of dispatching. Instead, this person would be better served by undergoing continuing education training as described in §§ 245.107(b)(2) and 245.119(j).

Paragraph (e) of this section states that after this rule has been in effect for eight months, no person may serve as a dispatcher unless that person is certified. Paragraph (f) of this section requires each railroad to make formal determinations concerning those individuals it has designated as dispatchers within three years after FRA's approval of the railroad's certification program. Pursuant to this paragraph, a designated dispatcher may serve as a dispatcher for up to three years from the date of FRA's approval of the program. At the end of the three years, however, the designated dispatcher can no longer

serve as a dispatcher unless they successfully complete the tests and evaluations provided in subpart B of this rule (i.e., the full certification process).

Thus, individuals who are designated as dispatchers and certified under paragraphs (c) or (d) of this section could be certified for more than three years before they have to complete the railroad's full certification process. For example, if a person is designated (and certified) as a dispatcher on September 1, 2024, and FRA approves the railroad's certification program on September 1, 2025, this dispatcher would not have to go through the full certification process and get recertified until September 1, 2028 (four years from the date the individual was designated by the railroad as a certified dispatcher). Railroads should note that they may not test and evaluate a designated dispatcher or dispatcher candidate under subpart B of this rule until they have a certification program approved by FRA pursuant to § 245.103.

In order to test and evaluate all of its designated dispatchers by the end of the three-year period, a large railroad will likely have to begin that process well in advance of the end of the three years. For example, paragraph (f), which is derived from part 240 and part 242's designation provisions, would permit a railroad to test and evaluate one-third of its designated dispatchers within one year of the approval date of the railroad's certification program; another one-third within two years of the program's approval date; and the final one-third within three years of the program's approval date.

To address the issue of designated dispatchers who would be eligible to retire within three years of the date FRA approves their railroad's certification program, FRA is proposing paragraphs (f)(1) through (3) in this section since it would not be an efficient use of a railroad's resources to perform the full certification process on a designated dispatcher who is going to retire before the end of their designation period. Paragraph (f)(1) provides that a designated dispatcher, who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or with the terms of the

Railroad Retirement Act (45 U.S.C. 231) within three years from the date FRA approves the railroad's certification program, may request, in writing, that the railroad not perform the full certification process on that designated dispatcher until three years from the date FRA approves the railroad's program.

Paragraph (f)(2) provides that, upon receipt of that written request, a railroad may wait to perform the full certification process on the person making the request until the end of the dispatcher's designation period. Thus, paragraphs (f)(1) and (2) allow designated dispatchers to serve as dispatchers for the full designation period and then retire before being subjected to the full certification process. While it is in the railroads' interest not to perform the full certification process for a person who is going to retire once the designation period expires, and thus, in their interest to grant as many requests as possible, it may not be feasible to accommodate every request that is made. If, for example, a significant number of designated dispatchers on a railroad properly request that the railroad wait to recertify them at the end of the designation period, but then do not, in fact, retire by the expiration of the designation period, the railroad might not be able to recertify everyone in time and would risk violating this rule. In recognition of that risk and the need to give the railroads some flexibility to comply with the rule, paragraph (f)(2) also provides that a railroad that grants any request must grant the request of all eligible persons "to every extent possible."

In addition, paragraph (f)(3) provides that a designated dispatcher, who is also subject to recertification under part 240 or 242, may not make a request under paragraph (f)(1) of this section. This provision recognizes that railroads would likely want to have concurrent certification processes for certifying a person who will be both a certified dispatcher and a certified locomotive engineer or conductor. Thus, it would not be appropriate, in that instance, for a designated dispatcher who is already subject to

recertification under part 240 or 242 to make a request to delay the full dispatcher certification process.

Paragraph (g) of this section provides that, after FRA approves a railroad's certification program, the railroad cannot certify or recertify a person as a dispatcher unless that person has been tested and evaluated in accordance with the procedures provided in subpart B of this rule. In other words, after FRA approves a railroad's program, that railroad can no longer designate individuals as certified dispatchers under paragraphs (c) or (d) of this section.

Section 245.107 Requirements for Certification Programs.

This section, derived from appendix B to part 240 and appendix B to part 242, provides both the organizational requirements and a narrative description of the submission required under §§ 245.101 and 245.103. FRA is not requiring railroad submissions to be made on a specific form. Instead, FRA is prescribing only minimal constraints on the organization and manner of presenting information.

Paragraph (a) of this section addresses what must be included in a railroad's submission to FRA. Specifically, the railroad must include two documents in its submission: (1) a request for approval; and (2) the certification program. If a railroad is submitting its initial certification program, the request for approval can be a brief document that simply states that the railroad is submitting its initial certification program for approval by FRA. However, if a railroad is making a material modification or modifications to a program that has previously been approved by FRA, the request for approval must mention all of the material modifications that the railroad is making to its program and the copy of the certification program will include all of the modifications.

Paragraph (b) of this section requires that the program be divided into six sections, each dealing with a different subject matter, and that the railroad identify the appropriate person to be contacted in the event FRA needs to discuss some aspect of the

railroad's program. Section 1 of a certification program shall include basic contact information and will address whether the railroad accepts responsibility for training previously uncertified dispatchers. Section 2 of a program addresses how the railroad will handle training dispatchers who have been previously certified. The main focus in Section 2 is how the railroad will address its requirement to provide continuing education for its previously certified dispatchers. Continuing education is essential because time and circumstances have the capacity to diminish both abstract knowledge and the proper application of that knowledge to discrete events. Time and circumstances also have the capacity to alter the value of previously obtained knowledge and the application of that knowledge. Therefore, dispatchers need to have their fundamental knowledge of operating rules and practices refreshed periodically. While a railroad has latitude to select the specific subject matters to be covered, the duration of the training, the methods of presenting the information, and the frequency with which the training will be provided, the railroad must describe in this section how it will use that latitude to ensure that its dispatchers remain knowledgeable concerning the safe discharge of their responsibilities so as to comply with the standard set forth in § 245.119(j).

A matter of particular concern to FRA is how each railroad acts to ensure that dispatchers remain knowledgeable about the territory over which they are authorized to dispatch, but from which the dispatcher has been absent. Paragraph (b)(2)(v) requires that Section 2 of the program addresses how long a person may be absent from dispatching over a territory before familiarization training is required and how the dispatcher will acquire that familiarization training. This time period can be less than 12 months, but it cannot exceed 12 months in accordance with § 245.120(c).

Section 3 of the program includes requirements for the testing and evaluation procedures for previously certified dispatchers. Paragraph (b)(3)(i) notes that railroads must address how their programs will comply with the standards found in § 245.121.

Section 245.121 directs that, when seeking a demonstration of the person's knowledge, a railroad must employ a written test that contains objective questions that cover the following subject matters: (i) safety and operating rules; (ii) timetable instructions; (iii) compliance with all applicable Federal regulations; (iv) physical characteristics of the territory on which a person will be serving as a dispatcher; and (v) dispatching systems and technology. The test must accurately measure the person's knowledge of all of these areas. Paragraph (b)(3)(ii) requires the program to detail the railroad's procedures for testing vision and hearing acuity and for ensuring that its medical examiners have sufficient knowledge to make a determination as to whether a person can safely work as a dispatcher.

Section 4 of the program includes the requirements for training, testing, and evaluating persons not previously certified. Railroads who elect, in Section 1 of the program, to not take responsibility for training previously uncertified dispatchers can skip this section. However, all other railroads must provide details for how they will train, test, and evaluate previously uncertified persons to ensure that they acquire and demonstrate sufficient knowledge and skills to safely perform the job of a dispatcher. Paragraph (b)(4)(ii) requires the same level of detail in this section that is required in Sections 2 and 3 of the program. This encompasses addressing both the training requirements found in § 245.119 and the knowledge testing requirements in § 245.121. If a railroad relies on another entity to conduct its training away from the railroad's own territory and dispatching systems, paragraph (b)(4)(iii) states that the railroad must explain in its program how dispatching students will be given the required training on the physical characteristics of the railroad's territory and its dispatching systems and technology.

Section 5 of the program addresses how the railroad will monitor the operational performance of its certified dispatchers in accordance with § 245.123. In particular, the

railroad must discuss the processes and procedures it will use for ensuring that such monitoring and testing is performed. This includes a description of the scoring system the railroad will employ during such testing. Finally, Section 6 of the program addresses how the railroad will perform its routine administration of the program. This section must include summaries of how the program will comply with the various provisions listed in paragraph (b)(6) that contain certain procedural requirements for a railroad's certification program.

Section 245.109 Determinations Required for Certification and Recertification.

This proposed section lists the determinations that would be required for evaluating a candidate's eligibility to be certified or recertified. The reference to § 245.303 in paragraph (a)(2) of this section is to ensure railroads determine whether a candidate is eligible to hold a certification by reviewing any prior revocations addressed in subpart D of this rule.

Despite the reference to provisions in §§ 245.111 and 245.113 requiring a review of safety conduct information from the preceding five years, § 245.113(h)(1) would not permit a railroad to consider information concerning safety conduct that occurred prior to the effective date of the final rule issued in this rulemaking. Even though this provision would result in a railroad's evaluation of less than five years' worth of information for some dispatchers early on in the rule's effective period, it is included in Part 245 for the same reason similar provisions were included in parts 240 and 242. Namely, that all dispatchers should be permitted to start with a "clean slate" for certification purposes as a matter of basic fairness. See 56 FR 28228, 28242 (June 19, 1991).

Paragraph (b) of this section would provide flexibility to railroads and dispatchers or dispatcher candidates in obtaining the information required by §§ 245.111 and 245.113.

Section 245.111 Prior Safety Conduct as Motor Vehicle Operator.

This section, derived from 49 CFR 240.111, 240.115, and 242.111, would provide the requirements and procedures that a railroad would be required to follow when evaluating a dispatcher or dispatcher candidate's prior safety conduct as a motor vehicle operator. FRA believes that the prior safety conduct of a motor vehicle operator is one indicator of that person's drug and/or alcohol use and therefore an important piece of information for a railroad to consider.

Pursuant to this section, each person seeking certification or recertification as a dispatcher would be required to request in writing that the chief of each driver licensing agency that issued them a driver's license within the preceding five years provide a copy of the person's driving record to the railroad. Unlike part 240, this proposed rule would not require individuals to also request motor vehicle operator information from the National Driver Register (NDR). Based on the NDR statute and regulation (*see* 49 U.S.C. chapter 303 and 23 CFR part 1327), railroads are prohibited from running NDR checks or requesting NDR information from individuals seeking employment as certified dispatchers.

Paragraphs (b) and (c) of this section would require a railroad to certify or recertify a person for 60 days if the person: (1) requested the required information at least 60 days prior to the date of the decision to certify or recertify; and (2) otherwise meets the eligibility requirements provided in § 245.109(a)(2) through (5). If a railroad certifies or recertifies a person for 60 days pursuant to paragraphs (b) and (c) but is unable to obtain and evaluate the required information during those 60 days, the person would be ineligible to perform as a dispatcher until the information can be evaluated. However, if a person is simply unable to obtain the required information, that person or the certifying or recertifying railroad could petition for a waiver from FRA (*see* 49 CFR part 211). During the pendency of the waiver request, a railroad would be required to certify or

recertify a person if the person otherwise meets the eligibility requirements of § 245.109(a)(2) through (5).

Paragraph (k) of this section would require certified dispatchers or persons seeking initial certification as dispatchers to notify the certifying railroad (or the prospective certifying railroad, if applicable) of motor vehicle incidents described in paragraphs (m)(1) and (2) of this section within 48 hours of the conviction or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for such incidents. This proposed paragraph would also prohibit railroads from having a more restrictive company rule requiring certified dispatchers to report a conviction or completed State action to cancel, revoke, or deny a motor vehicle driver's license in less than 48 hours.

The reasoning behind proposed paragraph (k) involves several intertwined objectives. As a matter of fairness, a railroad should not revoke, deny, or otherwise make a person ineligible for certification until that person has received due process from the State agency taking the action against the motor vehicle license. Further, by not requiring reporting until 48 hours after the completed State action, the proposed rule would have the practical effect of ensuring that a required referral to a drug and alcohol counselor (DAC) under paragraph (n) of this section would not occur prematurely. However, proposed paragraph (k) would not prevent an eligible person from choosing to voluntarily self-refer. Nor would it prevent the railroad from referring the person for an evaluation under an internal railroad policy, if other information exists that identifies the person as possibly having a substance abuse disorder.

Paragraph (n) of this section would provide that, if a motor vehicle incident described in paragraph (m) is identified, the railroad would be required to provide the data to its DAC along with "any information concerning the person's railroad service record." Furthermore, the person would have to be referred for evaluation to determine

whether the person has an active substance abuse disorder. If the person has an active substance abuse disorder, the person would not be eligible for certification. However, even if it is determined that the person is not currently affected by an active substance abuse disorder, the railroad would be required, if recommended by a DAC, to condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs or both. The intent of this proposed provision is to use motor vehicle records to identify dispatchers or candidates for dispatcher certification who may have active substance abuse disorders and make sure they are referred for evaluation and any necessary treatment before allowing them to perform safety sensitive service. Any testing performed as a result of a DAC's recommendation under paragraph (n) would be done under company authority, not Federal authority. However, the testing would be required to comply with the "technical standards" of part 219, subpart H, and part 40.

Paragraph (n)(5) is intended to clarify that failure to cooperate in the DAC evaluation discussed in paragraph (n)(2) of this section would result in the person being ineligible to perform as a certified dispatcher until such time as the person cooperates in the evaluation.

Section 245.113 Prior Safety Conduct with Other Railroads.

This proposed section, which is derived from 49 CFR 240.113, 240.205, and 242.113, would establish a process for certification candidates to request information about their prior safety conduct when employed or certified by another railroad. Except as otherwise provided by the retroactive time limit contained in paragraph (g) of this section, this section would require railroads to review records provided by railroads that previously employed or certified the certification candidate regarding the candidate's prior compliance with §§ 245.115 and 245.303 within the previous five years, as well as the candidate's prior compliance with § 245.111 within the previous three years.

Paragraph (b) of this section contains an exception that if a certification candidate has not been employed or certified by any other railroad in the previous five years, they do not have to submit a request pursuant to paragraph (c) of this section. Such candidates, however, must notify the railroad to which they are seeking certification of this fact. This exception should help minimize any burden arising from these proposed requirements.

For certification candidates who do not qualify for the exception provided in paragraph (b), paragraph (c) would require the certification candidate to submit a written request to each railroad that employed or certified the candidate within the previous five years. As indicated earlier, the written request would direct the previous railroad employer or certifying railroad to provide information about the certification candidate's prior compliance with §§ 245.115 and 245.303 within the previous five years, as well as the candidate's prior compliance with § 245.111 within the previous three years from the date of the written request.

In addition, railroads would be required by paragraph (e) of this section to comply with written requests for records of prior safety conduct submitted by former employees or certified persons pursuant to this section within 30 days after receipt of such requests. Railroads that are unable to provide information about prior safety conduct within 30 days would be required, by paragraph (f) of this section, to either: (1) provide a written explanation of why the railroad cannot provide the information within the requested time frame, along with an estimate of how much time will be needed to supply the requested information; or (2) provide an adequate explanation for why the railroad cannot provide the information requested.

In the event a railroad seeking to certify or recertify a certification candidate receives a written statement from another railroad pursuant to paragraph (f) of this section, which explains that the railroad cannot provide the information requested, the

railroad seeking to certify or recertify the certification candidate would be deemed to have complied with the eligibility determination required by paragraph (a) of this section provided it retains a copy of the other railroad's written statement in its records.

Similarly, in the event a railroad seeking to certify or recertify a certification candidate does not receive any written response from other railroads, the railroad would be deemed to have complied with the eligibility determination required by paragraph (a) of this section provided it retains a copy of the written request for this information in its records.

Section 245.115 Substance Abuse Disorders and Alcohol Drug Rules Compliance.

This proposed section, which is derived from 49 CFR 240.119, 240.205, and 242.115, addresses: (1) active substance abuse disorders and (2) specific alcohol/drug regulatory violations. As noted earlier, annual drug and alcohol testing data submitted to FRA revealed that dispatch employees had a random violation rate (drug and alcohol positives and refusals) and a pre-employment violation rate that was considerably higher than their train and engine service counterparts.

Therefore, this section and § 245.111 address certain situations in which inquiry must be made into the possibility that the individual has an active substance abuse disorder if the individual is to obtain or retain a certificate. The fact that specific instances are cited in this section would not eliminate the general duty of the railroad to take reasonable and proportional action in other appropriate cases. Declining job performance, extreme mood swings, irregular attendance, and other indicators may, to the extent not immediately explicable, indicate the need for an evaluation under internal policies of the railroad.

The purpose of identifying conditions is not to require (and does not require) a railroad to order an evaluation any time a listed condition is exhibited. Rather, FRA is simply providing guidance here as to conditions that may, given the context, call for an

evaluation under internal policies of the railroad. Moreover, FRA remains vigilant of harassment and intimidation and will take appropriate action if such conduct is discovered.

Paragraph (a) of this section would require railroads to determine that a person initially certifying, or a dispatcher recertifying, meets the eligibility requirements of this section. In addition, each railroad would be required by § 245.203 to retain the documents used to make that determination.

Paragraph (c) of this section would prohibit a person with an active substance abuse disorder from being certified as a dispatcher. This means appropriate action must be taken with respect to a certificate (whether denial or suspension) whenever the existence of an active substance abuse disorder comes to the official attention of the railroad, with the exception discussed below. Paragraph (c) would also provide a mechanism for an employee to voluntarily self-refer for substance abuse counseling or treatment.

Paragraph (d) would address conduct constituting a violation of § 219.101 or § 219.102 of FRA's alcohol/drug regulations. Section 219.101(a)(1) prohibits regulated employees from using or possessing alcohol or any controlled substance when the employee is on duty and subject to performing regulated service for a railroad. Section 219.101(a)(2) prohibits regulated employees from reporting for regulated service, or going on or remaining on duty in regulated service, while under the influence of (or impaired by) alcohol or while having a breath or blood alcohol concentration of 0.04 or more. A regulated employee is also prohibited from using alcohol either within four hours of reporting for regulated service or after receiving notice to report for regulated service, whichever is less. This is conduct that specifically and directly threatens safety in a way that is wholly unacceptable, regardless of its genesis and regardless of whether it has occurred previously. In its more extreme forms, such conduct is punishable as a

felony under the criminal laws of the United States (18 U.S.C. 341 et seq.) and a number of states.

Section 219.102 prohibits use of a controlled substance by a regulated employee at any time, whether on or off duty, except for approved medical use. Abuse of marijuana, cocaine, amphetamines, and other controlled substances poses unacceptable risks to safety.

Under the alcohol/drug regulations, whenever a violation of § 219.101 or § 219.102 is established, based on authorized or mandated chemical testing, the employee must be removed from service and may not return until after an SAP evaluation, any needed treatment and/or education, and a negative return-to-duty test, and follow-up testing (as required by § 219.104). These requirements constitute an absolute minimum standard for action when a dispatcher is determined to have violated one of these prohibitions. Considering the need both for general and specific deterrence with respect to future unsafe conduct, additional action should be premised on the severity of the violation and whether the same individual has had prior violations.

This proposed rule would require railroads to consider conduct that occurred within the period of five consecutive years prior to the review. This is the same period provided in this proposed rule as the maximum period of ineligibility for certification following repeated alcohol/drug violations and is the same period used in parts 240 and 242. Use of a five-year cycle reflects railroad industry experience indicating that conduct committed as much as five years before may tend to predict future alcohol or drug abuse behavior. For example, in analyzing data submitted to FRA between 2017 and 2021, FRA found that railroad employees returning to duty from previous drug or alcohol violations were approximately five times more likely to test positive than other railroad employees. Of course, railroads would retain the flexibility to consider prior conduct

(including conduct more than five years prior) in determining whom they will hire as dispatchers.

Conduct violative of the FRA proscriptions against alcohol and drugs need not occur while the person is serving in the capacity of a dispatcher in order to be considered. For instance, a person who violated § 219.101 while working as a locomotive engineer and then sought dispatcher certification six months later (under the provision described below) would not be eligible for certification. The same is true under Part 240 – an employee who violates § 219.101 while working as a brakeman and then seeks locomotive engineer certification six months later would not be eligible for certification at that time. The responsibility of the railroad would therefore not be limited to periodic recertification. This proposed rule would require a review of certification status for any conduct in violation of § 219.101 or § 219.102.

The proposed rule would require a determination of ineligibility for a period of nine months for an initial violation of § 219.101. This would parallel the nine-month disqualification in §§ 240.119(c)(4)(iii) and 242.115(e)(4)(iii).

Specifying a period of ineligibility serves the interest of deterrence while giving further encouragement to deal with the problem before it is detected by management. In order to preserve and encourage referrals, the nine-month period could only be waived in the case of a qualifying referral (*see* § 219.1001). FRA believes that this distinction in treatment, which is also found in part 242, is warranted as a strong inducement to participation because referral programs help identify troubled employees before those employees get into accidents and incidents. Although FRA does not know how many actual referrals may be generated, the intended result would be reached if an atmosphere of intolerance for drug and/or alcohol abusing behavior is reinforced in the workplace and violators know that they may be reported by their colleagues or others if they report for duty while impaired.

In the case of a second violation of § 219.101, the dispatcher would be ineligible for a period of five years. Given railroad employment practices and commitment to alcohol/drug compliance, it is likely that any individual so situated may also be permanently dismissed from employment. However, it would be important that the employing railroad follow through and revoke the certificate under this proposed rule, so the dispatcher could not go to work for another railroad (or railroad contractor) within the five-year period using the unexpired certificate issued by the first railroad as the basis for certification. These proposed sanctions mirror the sanctions in §§ 240.119 and 242.115.

Under this proposed rule, one violation of § 219.102 within the five-year window would require only temporary suspension and the minimum response described in § 245.115(e) (referral for evaluation, treatment as necessary, negative return-to-duty test, and appropriate follow-up). This parallels the approach taken in parts 240 and 242 and reflects FRA's intent to not undercut the therapeutic approach to drug abuse employed by many railroads. This approach permits first-time positive drug tests to be handled in a non-punitive manner that concentrates on remediation of any underlying substance abuse problem and avoids the adversarial process associated with investigations, grievances, and arbitrations under the Railway Labor Act and collective bargaining agreements. A second violation of § 219.102 would subject the employee to a mandatory two-year period of ineligibility. A third violation within five years would lead to a five-year period of ineligibility.

This proposed rule also addresses violations of §§ 219.101 and 219.102 in combination. A person violating § 219.101 after a prior § 219.102 violation would be ineligible for three years; and the same would be true for the reverse sequence. This mirrors the ineligibility period for locomotive engineers and conductors who have one § 219.101 violation and one § 219.102 violation. *See* 49 CFR 240.119(e)(4)(ii) and 242.115(e)(4)(ii).

Refusals to participate in chemical tests would be treated as if the test were positive. A refusal to provide a breath or body fluid sample for testing under the requirements of 49 CFR part 219 when instructed to do so by a railroad representative would be treated, for purposes of ineligibility under this section, in the same manner as a violation of: (1) § 219.101, in the case of a refusal to provide a breath sample for alcohol testing, or a blood specimen for mandatory post-accident toxicological testing; or (2) § 219.102, in the case of a refusal to provide a body fluid specimen for drug testing. Interested parties should, however, note that 49 CFR part 40, subpart I, discusses medical conditions under which an individual's failure to provide a sufficient sample would not be deemed a refusal. In addition, subpart G of FRA's alcohol and drug regulations excuses employees from compliance with the requirement to participate in random drug and alcohol testing if the employee can substantiate a medical emergency involving the employee or an immediate family member. *See* 49 CFR 219.617.

If an employee covered by 49 CFR part 219 refuses to provide a breath or body fluid specimen or specimens when required to by a railroad pursuant to a mandatory provision of 49 CFR part 219, then the railroad (apart from any action it takes under part 245) would be required to remove that employee from regulated service and disqualify the employee from working in regulated service for nine months. *See* 49 CFR 219.104 and 219.107; *see also*, 49 CFR part 219, subpart H, and 49 CFR 40.191 and 40.261.

Paragraph (e) prescribes the conditions under which employees may be certified or recertified after a determination that the certification should be denied, suspended, or revoked, due to a violation of § 219.101 or § 219.102 of FRA's alcohol/drug regulations. These conditions are derived from the conditions in §§ 240.119(d) and 242.115(f) and closely parallel the return-to-duty provisions of the alcohol/drug rule. The proposed regulation would not require compensation of the employee for the time spent in this testing, which is a condition precedent to retention of the certificate; but the issue of

compensation would ultimately be resolved by reference to the collective bargaining agreement or other terms and conditions of employment under the Railway Labor Act. Moreover, the railroad that intends to withdraw its conditional certification would be required to afford the dispatcher the hearing procedures provided by § 245.307 if the dispatcher does not waive their right to the hearing.

Paragraph (f) would ensure that a dispatcher, like any other covered employee, can self-refer for treatment under the alcohol/drug rule (49 CFR 219.1003) before being detected in violation of alcohol/drug prohibitions and would be entitled to confidential handling of that referral and subsequent treatment. This means that a railroad would not normally receive notice from the DAC of any substance abuse disorder identified as a result of a voluntary self-referral under 49 CFR 219.1003. However, paragraph (f) would also require that the railroad policy provide that confidentiality is waived if the dispatcher at any time refuses to cooperate in a recommended course of counseling or treatment, to the extent that the railroad must receive notice that the employee has an active substance abuse disorder so that appropriate certificate action can be taken. The effect of this proposed provision is that the certification status of a dispatcher who seeks help and cooperates in treatment would not be affected, unless the dispatcher fails to follow through.

Section 245.117 Vision Acuity.

This proposed section, derived from 49 CFR 240.121, 240.207, and 242.117, contains the requirements for vision acuity testing that a railroad would have to incorporate in its dispatcher certification program. This section differs from its analogous sections in 49 CFR parts 240 and 242 in that 49 CFR parts 240 and 242 address the requirements for vision and hearing acuity in the same section. However, FRA determined that for this proposed rule, it could more clearly present these

requirements if they were in two separate sections: one section for vision acuity (§ 245.117) and one section for hearing acuity (§ 245.118).

Paragraph (c) of this section contains the general vision standards that a person must satisfy in order to be certified as a dispatcher unless they are determined to have sufficient vision acuity under paragraph (d) of this section. The standards in paragraph (c) mirror the vision acuity standards for locomotive engineers and conductors in 49 CFR parts 240 and 242. In drafting this proposed rule, FRA discussed whether vision acuity standards were necessary for dispatchers and if so, whether they needed to be as stringent as the standards for engineers and conductors. Ultimately, FRA concluded that dispatchers should have to satisfy certain vision standards with a dispatcher's ability to distinguish between colors being particularly important. FRA requests comments on whether vision acuity standards for dispatchers are necessary, and if so, whether they should be as strict as the standards for locomotive engineers and conductors.

Although some individuals may not be able to meet the threshold acuity levels in paragraph (c) of this section, they may be able to compensate in other ways that will permit them to function at an appropriately safe level despite their physical limitations. Paragraph (d) of this section permits a railroad to have procedures whereby medical examiners can evaluate such individuals and make discrete determinations about each person's ability to compensate for their physical limitations. If the railroad's medical examiner concludes that an individual has compensated for their limitations and could safely serve as a dispatcher, the railroad could certify that person under this regulation once the railroad possesses the medical examiner's professional medical opinion to that effect. If necessary, medical examiners can condition their opinion on certain circumstances or restrictions, such as the use of corrective lens for example.

Paragraph (e) of this section describes what documents the railroad must keep on file with respect to vision acuity testing. Such records must be retained for both

individuals who the railroad certifies as dispatchers and those individuals who the railroad denies certification. Paragraph (g) of this section addresses the issue of vision deterioration. Once certified dispatchers become aware that their vision has deteriorated, they must notify the railroad before performing any subsequent service as a dispatcher. FRA presumes that certified dispatchers would most likely become aware of deterioration in their vision either through their own personal observation or through examination by a medical professional. Should this occur, before a certified dispatcher can return to service, they must be reexamined. If upon reexamination, the railroad's medical examiner concludes that the certified dispatcher still satisfies the vision acuity standards in this part, the dispatcher can return to service. However, if the medical examiner concludes that the dispatcher no longer satisfies these requirements, the railroad must deny the person's certification in accordance with § 245.301, regardless of how much time remains before the dispatcher's current certificate expires. Certified dispatchers should note that willful noncompliance with the notification requirement in this paragraph could result in enforcement action.

Section 245.118 Hearing Acuity.

This proposed section, derived from 49 CFR 240.121, 240.207, and 242.117, contains the requirements for hearing acuity testing that a railroad would have to incorporate in its dispatcher certification program.

Paragraph (c) of this section contains the general hearing standards that a person must satisfy in order to be certified as a dispatcher unless they are determined to have sufficient hearing acuity under paragraph (d) of this section. The standards in paragraph (c) mirror the hearing acuity standards for locomotive engineers and conductors in 49 CFR parts 240 and 242. FRA discussed whether hearing acuity standards were necessary for dispatchers and if so, whether they needed to be as stringent as the standards for engineers and conductors. Ultimately, FRA concluded that dispatchers should have to

satisfy certain hearing standards and it was logical for these standards to be consistent with the hearing standards for engineers and conductors. FRA requests comments on whether hearing acuity standards for dispatchers are necessary, and if so, whether they should be as strict as the standards for locomotive engineers and conductors.

Although some individuals may not be able to meet the threshold acuity levels in paragraph (c) of this section, they may be able to compensate in other ways that will permit them to function at an appropriately safe level despite their physical limitations. Paragraph (d) of this section permits a railroad to have procedures whereby doctors can evaluate such individuals and make discrete determinations about each person's ability to compensate for their physical limitations. If the railroad's medical examiner concludes that an individual has compensated for their limitations and could safely serve as a dispatcher, the railroad could certify that person under this regulation once the railroad possesses the medical examiner's professional medical opinion to that effect. If necessary, medical examiners can condition their opinion on certain circumstances or restrictions, such as the use of a hearing aid for example.

Paragraph (e) of this section describes what documents the railroad must keep on file with respect to hearing acuity testing. Such records must be retained for both individuals who the railroad certifies as dispatchers and those individuals who the railroad denies certification. Paragraph (g) of this section addresses the issue of hearing deterioration. Once certified dispatchers become aware that their hearing has deteriorated, they must notify the railroad before performing any subsequent service as a dispatcher. FRA presumes that certified dispatchers would most likely become aware of deterioration in their hearing either through their own personal observation or through examination by a medical professional. Should this occur, they must be reexamined before returning to service. If upon reexamination, the railroad's medical examiner concludes that the certified dispatcher still satisfies the hearing acuity standards in this

part, the dispatcher can return to service. However, if the medical examiner concludes that the dispatcher no longer satisfies these requirements, the railroad must deny the person's certification in accordance with § 245.301, regardless of how much time remains before the dispatcher's current certificate expires. Certified dispatchers should note that willful noncompliance with the notification requirement in this paragraph could result in enforcement action.

Section 245.119 Training Requirements.

This proposed section, derived from 49 CFR 240.123, 240.213, and 242.119, would require railroads to provide initial and periodic training to dispatchers. Such training is necessary to ensure that dispatchers have the knowledge, skills, and abilities necessary to safely perform all of the safety-related duties mandated by Federal laws, regulations, and orders.

Paragraph (b) of this section requires a railroad's certification program to address whether the railroad will accept responsibility for training dispatchers and thus be able to initially certify dispatchers or whether the railroad will only be recertifying dispatchers who were previously certified by other railroads. If a railroad accepts responsibility for training dispatchers, paragraph (c) of this section notes that the railroad must state in its certification program whether it will conduct the training program for dispatchers or it will have another entity perform the training on its behalf.

Under this section, railroads have latitude to design and develop the training and delivery methods they will employ; but paragraphs (d), (e), and (f) of this section provide requirements for railroads that elect to train a previously untrained person to be a dispatcher. Pursuant to paragraph (d), a railroad that makes this election would be required to determine how training must be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, on-the-job training, or other formal training. Paragraph (d)(3) also

requires railroads to review and modify their training programs whenever new safety-related railroad laws, regulations, orders, technologies, procedures, software, or equipment are introduced into the workplace.

Paragraph (f) of this section provides the requirements a previously untrained person must satisfy in order to become certified. Paragraph (f)(2) states the person must demonstrate on-the-job proficiency by successfully completing dispatching tasks and using the necessary dispatching systems and technology. These tasks may be performed under the direct onsite supervision of a person who has the necessary dispatching experience and at least one year of experience as a dispatcher. FRA requests comments, including any supporting data, on whether this “one year of experience” requirement for persons supervising a certification candidate is sufficient. The final requirement, found in paragraph (f)(3), is that the previously untrained person shall demonstrate their knowledge of the physical characteristics of any assigned territory by successfully completing a test. FRA understands that a railroad may assign dispatchers additional territories after they become certified and the dispatchers can go through the process for becoming qualified on those territories after they are already certified. However, paragraph (f)(3) establishes the basic requirement that before a previously untrained person can become certified, they must demonstrate that they are qualified on at least one territory. Paragraph (f)(3) also requires railroads to provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a test question. This requirement is equivalent to 49 CFR 242.119(f) and is included so that certification candidates being tested would be able to obtain clarification of test questions from someone who possesses knowledge of the relevant territory.

Paragraph (g) of this section requires railroads to retain written documentation of the listed determinations. Paragraph (g)(1) only applies to individuals who have not been

previously certified as dispatchers whereas paragraphs (g)(2) and (3) apply to all certified dispatchers.

Paragraph (h) of this section requires a railroad's certification program to explain the methods for acquiring familiarity with the physical characteristics of a territory and becoming qualified or requalified on a territory. Paragraph (h)(3) requires railroads to designate in their programs the maximum amount of time that a dispatcher can be absent from a territory before requalification is required. To conform with § 245.120(c), this time period cannot exceed 12 months. However, railroads can choose a shorter time period if they desire. For example, if a railroad wants to require that a dispatcher get requalified on a territory if they have not dispatched over that territory in six months, the railroad is allowed to do so, but it must include this requirement in its certification program.

Section 245.120 Requirements for Territorial Qualification.

This proposed section, derived from 49 CFR 240.231 and 242.301, explains the requirements for territorial qualifications. Paragraph (a) of this section prohibits railroads from permitting or requiring a person to serve as a dispatcher on a particular territory, unless the railroad determines that the person is a certified dispatcher who is either qualified on that particular territory or assisted by a Dispatcher Pilot who is qualified on the territory. Paragraph (b) of this section requires a person to immediately notify the railroad if they are called to serve on a territory on which the person is not qualified. In such scenarios, the dispatcher could only dispatch over the territory if they were assisted by a Dispatcher Pilot who is qualified on the territory. Paragraph (c) of this section establishes that the maximum amount of time that a dispatcher can be absent from a territory before requalification on that territory is required is 12 months. However, railroads have the option, under § 245.119(h)(3), to make this time period shorter.

Section 245.121 Knowledge Testing.

This proposed section, derived from 49 CFR 240.125, 240.209, and 242.121, would require railroads to provide for the initial and periodic testing of dispatchers. Paragraph (b) of this section outlines the general requirements for such testing. This testing will have to effectively examine and measure a dispatcher's knowledge of five subject areas: safety and operating rules; timetable instructions; compliance with all applicable Federal regulations; physical characteristics of the territory on which a person will be or is currently working as a dispatcher; and dispatching systems and technology.

Under this section, railroads have discretion to design the tests that will be employed; for most railroads that will entail some modification of their existing "book of rules" examination to include new subject areas. This section does not specify the number of questions to be asked or the passing score to be obtained. However, it does require that the test be conducted without open reference books unless use of such materials is part of a test objective. A railroad may not give an all-open book exam. Some portion of the test must be closed book. Since the testing procedures and requirements selected by the railroad would be submitted to FRA for approval, FRA would monitor the exercise of discretion being afforded railroads by this section.

Paragraph (c) of this section mirrors 49 CFR 242.121(e) by requiring railroads to provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a test question.

Paragraph (d) of this section states that if a person fails a test, the railroad cannot allow that person to serve as a dispatcher until they achieve a passing score on reexamination. The railroad would decide how much time, if any, must pass after a test failure before a certification candidate can be reexamined. Furthermore, the railroad would decide what additional training, if any, a candidate would receive after a test failure. The railroad would also decide whether there should be a limit on the number of

times a candidate could retake a test, and if so, the maximum number of test retakes the railroad will allow.

Section 245.123 Monitoring Operational Performance.

This proposed section, derived from 49 CFR 240.129 and 242.123, contains the requirements for conducting unannounced compliance tests. Paragraph (a) of this section requires each railroad to describe in its certification program how it will monitor the conduct of its certified dispatchers by performing unannounced compliance tests on railroad and Federal rules, as well as territorial and dispatch systems. Paragraph (a)(3) requires railroads to indicate the types of actions they will take in the event they find deficiencies with a dispatcher's performance during an unannounced compliance test. FRA believes it is up to each railroad to decide the appropriate action to take in light of various factors, including collective bargaining agreements. Further, FRA believes that the vast majority of railroads have adequate policies to deal with deficiencies with a dispatcher's performance and have handled them appropriately for many years.

To avoid restricting the options available to the railroads and employee representatives to develop processes for handling test failures, FRA designed this regulation to be as flexible as possible. There are a variety of actions and approaches that a railroad could take such as developing and providing formal remedial training for dispatchers who fail tests or have deficiencies in their performance. Each railroad could also consider implementing a formal procedure whereby a dispatcher is given the opportunity to explain, in writing, the factors that they believe caused their test failure or performance deficiencies. This explanation may allow a railroad to determine what areas of training to focus on or perhaps discover that the reason for the failure/deficiency was due to something other than a lack of skills. FRA believes there are numerous other approaches that could be considered and evaluated by railroads and their dispatchers, and

FRA does not want to stifle a railroad's ability to adopt an approach that is best for its organization.

Paragraph (b) of this section provides the requirements for these unannounced compliance tests, including the operational tests that must be performed and who is allowed to conduct the test. Paragraph (b)(3) specifies that each railroad must give each of its certified dispatchers at least one unannounced compliance test each calendar year, except as provided in paragraph (c) of this section. FRA recognizes that before these unannounced compliance tests can be performed in conformance with this section, a railroad's certification program must first be approved by FRA. Thus, at the latest, FRA expects railroads to perform these unannounced compliance tests on all of their certified dispatchers during the calendar year immediately following the year their certification program is first approved by FRA. For example, if FRA approves one railroad's program in January 2025 and another railroad's program in December 2025, both of these railroads would have to perform unannounced compliance tests on all of their certified dispatchers starting in 2026. While FRA would encourage these railroads to commence the unannounced tests after their programs are approved in 2025, FRA recognizes it may not be practical to perform unannounced tests on all of their certified dispatchers by the end of 2025, especially for the railroad whose program was not approved until December 2025.

Paragraph (c) of this section recognizes that some certified dispatchers may not be performing a service that requires a dispatcher certificate, and thus, a railroad may not be able to provide those dispatchers with the annual, unannounced compliance test. For example, a certified dispatcher may be on furlough, in military service, off with an extended illness, or working in another service. In situations like these where a dispatcher is not performing service that requires certification, the railroad does not have to give an unannounced compliance test. However, when the certified dispatcher returns

to dispatcher service, they will have to be given an unannounced compliance test within 30 days of their return. Moreover, the railroad will have to retain a written record that documents the date the dispatcher stopped performing service requiring certification, the date the dispatcher returned to service requiring certification, and the date the dispatcher received their unannounced compliance test following their return to service requiring certification.

Section 245.125 Certification Determinations Made by Other Railroads.

This section of the proposed rule, derived from 49 CFR 240.225 and 242.125, contains requirements that would apply when a certified or previously certified dispatcher is about to begin work for a different railroad. This section would permit a railroad to rely on determinations made by another railroad concerning a person's certification. However, this section would require railroads to address in their certification programs how they will administer training for previously uncertified dispatchers with extensive dispatching experience or previously certified dispatchers who have had their certification expire. In both scenarios, FRA would allow the railroad to reduce the on-the-job training that might otherwise be required if the person were treated as having no dispatching experience. However, if a railroad's certification program fails to specify how the railroad will train a dispatcher who was previously certified by another railroad, all dispatchers and dispatcher candidates will be required to take the railroad's entire training program (regardless of the dispatcher's prior certification status).

Subpart C – Administration of the Certification Program

Section 245.201 Time Limitations for Certification.

This proposed section, derived from 49 CFR 240.217 and 242.201, contains various time constraints to preclude railroads from relying on stale information when evaluating candidates for certification or recertification. For example, when making a determination of eligibility based on prior safety conduct as an employee of a different

railroad pursuant to § 245.113, paragraph (a) would prohibit a railroad from relying on data provided more than one year before the date of the railroad's certification decision. However, paragraph (b) goes on to explain that the time constraints listed in paragraph (a) would not apply to railroads who are not evaluating candidates for certification or recertification, but simply relying on eligibility determinations that have already been made by another railroad in accordance with § 245.125.

Paragraph (c) prohibits a railroad from certifying a person as a dispatcher for more than three years except for those individuals who are designated as certified dispatchers under § 245.105(c) or (d). When a railroad designates an individual as a certified dispatcher under § 245.105(c) or (d), that certification can last for three years after the date that FRA initially approves the railroad's certification program. This could lead to situations where a certificate could be valid for more than three years. For example, if a railroad designates an individual as a certified dispatcher in January 2025, but FRA does not approve the railroad's certification program until January 2026, the dispatcher's certification could last until January 2029 (four years in total). However, any subsequent recertifications for that dispatcher could only last for three years. In other words, if the dispatcher in the previous example got recertified in January 2029, that certificate would expire no later than January 2032.

Paragraph (d) would require railroads to issue certificates that comply with § 245.207 to their certified dispatchers within 30 days from the date of the railroad's decision to certify or recertify that person.

Section 245.203 Retaining Information Supporting Determinations.

This proposed section, derived from 49 CFR 240.215 and 242.203, contains recordkeeping requirements for railroads that certify dispatchers. Paragraph (b) lists the information that railroads would be required to retain for each of their certified dispatchers and certification candidates, while paragraph (e) provides that all records

required to be retained must be retained for six years from the date of the railroad's certification, recertification, denial, or revocation decision. Paragraph (e) would also require railroads to make these records available to FRA representatives, upon request, in a timely manner.

Paragraph (f) would prohibit railroads and individuals from falsifying records that railroads are required to retain pursuant to this section. Paragraph (g) contains minimum standards for electronic recordkeeping with which railroads would be required to comply, in order to maintain electronic versions of the required records. These minimum standards for electronic recordkeeping are virtually identical to the electronic recordkeeping standards contained in 49 CFR 242.203.

Section 245.205 List of Certified Dispatchers and Recordkeeping.

This proposed section, derived from 49 CFR 240.221 and 242.205, would require a railroad to maintain a list of its certified dispatchers. Paragraph (b) of this section would also require a railroad to update its list of certified dispatchers at least annually and to make its list of certified dispatchers available, upon request, to FRA representatives in a timely manner.

Paragraph (c) contains minimum standards for electronic recordkeeping with which railroads would be required to comply, in order to maintain an electronic version of the list of certified dispatchers required by this section. These minimum standards are similar to the electronic recordkeeping standards contained in 49 CFR 242.205.

Paragraph (d) would prohibit railroads and individuals from falsifying the list of certified dispatchers that railroads are required to maintain pursuant to this section.

Section 245.207 Certificate Requirements.

This proposed section contains requirements for the certificate that each certified dispatcher would be required to carry. The requirements in paragraphs (a) – (e) of this section, which pertain to the required minimum content for certificates and authorization

of the person designated by the railroad to sign the certificates, are derived from 49 CFR 240.223 and 242.207.

Paragraph (a) of this section specifies that railroads have the option of issuing certificates electronically or in paper form. Paragraph (a)(1) would require that the dispatcher certificate identify the railroad issuing the certificate. Therefore, a certified dispatcher who works for more than one railroad would be required to have a separate certificate for each railroad with which the dispatcher is currently certified. Paragraph (a)(7) would require the certificate to be signed by an individual who has been designated by the railroad as an authorized signatory of dispatcher certificates, as described in paragraph (c) of this section. Electronic signatures are permitted under this proposed rule. In addition, paragraph (e) of this section would prohibit railroads and individuals from falsifying dispatcher certificates.

Paragraphs (f) and (i) are derived from 49 CFR 240.305 and 242.209. These paragraphs would require dispatchers to have their certificates in their possession while on duty as a dispatcher, to display their certificates when requested to do so by FRA representatives, State inspectors¹⁸ authorized under 49 CFR part 212, and certain railroad officers, and to notify a railroad if they are called to serve as a dispatcher in a service that would cause them to exceed their certificate limits.

Paragraph (g), derived from 49 CFR 240.301 and 242.211(a), would require railroads to promptly replace a dispatcher's certificate at no cost to the dispatcher, if the certificate is lost, stolen, or mutilated. However, unlike § 242.211(b), this section does not contain detailed requirements for temporary replacement certificates. Temporary replacement certificates generally contain most of the information provided on official certificates. Therefore, it does not appear to be especially burdensome for railroads to

¹⁸ Although State inspectors authorized under 49 CFR part 212 could be considered "FRA representatives," they are mentioned separately in this section to ensure that there is no dispute regarding their authority.

issue temporary certificates to replace certificates that have been lost, stolen, or mutilated. Nonetheless, by refraining from proposing a formal process for the issuance of temporary dispatcher replacement certificates, FRA would allow railroads to decide how and when to issue temporary replacement certificates to dispatchers. FRA is soliciting comment on this proposed approach.

*Section 245.213 Multiple Certifications.*¹⁹

This proposed section, derived from 49 CFR 240.308 and 242.213, establishes how railroads should handle certified dispatchers who are certified with multiple railroads, attempting to become certified with multiple railroads, or certified in another railroad craft. FRA recognizes that while it is fairly common for an individual to work as both a locomotive engineer and a conductor, it is less common for a dispatcher to also work in another craft that requires certification. However, because situations may arise where a dispatcher is also certified to work in another craft, such as a locomotive engineer or conductor, FRA wanted to address how to handle such situations.

Paragraph (a) of this section would allow a certified dispatcher to become certified in one or more of the other railroad crafts that require certification such as locomotive engineer or conductor. If a person is certified in multiple crafts by the same railroad, paragraph (b) would require the railroad to coordinate the expiration dates of the certificates, to the extent possible. While railroads are not required to have all of a person's certificates expire at the same time, it would be beneficial, from the standpoint of administering the certification programs, if railroads followed this practice. Thus, FRA encourages railroads to coordinate these expiration dates when possible.

¹⁹ To the extent possible, FRA has attempted to match the section numbers in this proposed rule to the analogous sections in the conductor certification rule (49 CFR part 242). Since 49 CFR 242.213 addresses multiple certification issues, FRA is proposing section number 245.213 for the multiple certification section in this proposed rule instead of the next sequential section number which would be 245.209.

Paragraph (c) of this section would pertain to individuals who are certified dispatchers for multiple railroads or who are seeking to become certified dispatchers for multiple railroads. Paragraph (c)(1) would require a dispatcher to notify all railroads with which the dispatcher holds a current dispatcher certificate, if another railroad denies, suspends, or revokes the dispatcher's certification. Paragraph (c)(2) would prohibit an individual from working as a dispatcher for *any* railroad while their dispatcher certification is suspended or revoked by a railroad. For example, if a person is a certified dispatcher with Railroad ABC and Railroad DEF, and ABC suspends and/or revokes the person's certificate, that person would not be able to work as a dispatcher for DEF, or any other railroad, during the period of suspension and/or revocation. Furthermore, paragraph (c)(3) states that if a person has their dispatcher certification suspended or revoked by one railroad, and they attempt to become a certified dispatcher with another railroad while their certification is suspended or revoked, they must notify the railroad they are seeking certification from of their current suspended or revoked certification status. Therefore, if a person is seeking dispatcher certification with Railroad XYZ while their dispatcher certificate is suspended or revoked by Railroad ABC, they must notify XYZ of their current suspended or revoked certification status.

Paragraphs (d), (e), and (f) of this section address how the revocation of a dispatcher's certification would affect an individual's ability to work in another railroad craft requiring certification, and vice versa. If a person's dispatcher certification was revoked because of a drug or alcohol violation, as described in § 245.303(e)(8), then that person would be ineligible to work in any craft requiring certification, such as a locomotive engineer or conductor, for any railroad during the period of revocation. Such person would also not be able to obtain a certificate in any of those crafts from any railroad while their dispatcher certificate is revoked. Likewise, if a person's non-dispatcher certification(s), such as locomotive engineer or conductor, are revoked

because of an alcohol or drug violation, that person will be ineligible to work as a certified dispatcher or obtain a dispatcher certificate from any railroad during the revocation period. In contrast, if a dispatcher's certification is revoked for a violation that does not involve alcohol or drugs, such as § 245.303(e)(1) through (7), that person would still be able to work in any other craft requiring certification, such as a locomotive engineer or conductor, during the period of revocation, as long as the person is certified in that craft. Likewise, a person could still work as a certified dispatcher if their certificate for another craft, such as locomotive engineer or conductor, was revoked due to a violation that did not involve drugs or alcohol.

FRA's reasoning for this line of delineation between revocable events that involve alcohol and drugs and those that do not is rooted in railroad safety. If someone shows up to work as a dispatcher under the influence of alcohol or drugs, it stands to reason that they could likely show up to work for another certified craft, such as a locomotive engineer or conductor, under the influence as well. Thus, it makes sense for an individual's alcohol or drug violations as a dispatcher to impact their eligibility to work in another craft that requires certification and vice versa. With respect to revocable events that do not involve alcohol or drugs, FRA finds that the tasks performed by a dispatcher are so inherently different from the tasks performed in another certified craft, such as an operating crew member, that it does not automatically follow that a person's revocable event as a dispatcher indicates that they are more likely to also have a revocable event while performing in another certified craft. Thus, FRA is taking the position that a revocation of a dispatcher certificate which does not involve alcohol or drugs should not affect that person's eligibility to work in another railroad craft requiring certification, and vice versa. However, FRA requests comments on this issue.

Paragraphs (g) and (h) of this section would prohibit a railroad from denying or revoking a dispatcher's certification just because their attempt at certification or

recertification in another railroad craft, such as locomotive engineer or conductor, was denied, and vice versa. Paragraph (i) of this section would allow a railroad to issue a single certificate to a person who is certified in multiple railroad crafts that require certification. If a railroad exercises this option, it must ensure that the single certificate contains all of the components required for each craft. Alternatively, railroads are also welcome to issue multiple certificates to a person who is certified in multiple crafts (one certificate for each craft). Thus, if a person is certified as both a dispatcher and conductor, the railroad could issue the person a single certificate containing both crafts or it could issue one dispatcher certificate and one conductor certificate.

Finally, paragraph (j) of this section denotes that if a person is certified in multiple crafts and they are involved in a revocable event, that event can only lead to the revocation of a certificate for a single railroad craft. The railroad must determine which certificate should be revoked based on the work the individual was performing at the time of the event. In such instances, while the railroad may only revoke a certificate for a single craft, that revocation could affect a person's eligibility to perform other crafts. For example, if a person who is certified as a dispatcher and a conductor, violates 49 CFR 219.101 while on duty as a dispatcher, the railroad should only revoke the individual's dispatcher certification. The person's conductor certificate cannot be revoked for the incident that occurred while the person was on duty as a dispatcher. However, as discussed in paragraph (d)(1) of this section, this person would not be able to work as a conductor while their dispatcher certificate was revoked for this offense.

Section 245.215 Railroad Oversight Responsibilities.

This proposed section, derived from 49 CFR 240.309 and 242.215, would require each Class I railroad (including the National Railroad Passenger Corporation), each railroad providing commuter service, and each Class II railroad to conduct an annual review and analysis of its program for responding to detected instances of poor safety

conduct by certified dispatchers. FRA has formulated the information collection requirements of this proposed section to ensure that railroads collect data on dispatcher safety behavior and feed that information into their operational monitoring efforts, thereby enhancing safety.

This section would require each Class I railroad (including the National Railroad Passenger Corporation), railroad providing commuter service, and Class II railroad to have an internal auditing plan to keep track of eight distinct events that involve poor safety conduct by dispatchers. For each event, the railroad would be required to indicate what response it took to that situation. The railroad would then be required to evaluate this information, together with data showing the results of annual operational testing and causation of FRA reportable train accidents, to determine what additional or different efforts, if any, are needed to improve the safety performance of that railroad's certified dispatchers. FRA would not require railroads to furnish this data or their analysis of the data to FRA. Instead, FRA would require that railroads be prepared to submit such information when requested.

As set forth in paragraph (i), an instance of poor safety conduct involving a person who is a certified dispatcher and is certified in another railroad craft (such as a locomotive engineer or conductor) need only be reported once under the appropriate section of this chapter (e.g., under § 240.309, § 242.215, or under this section). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred. This determination is similar to the determination made under part 225, in which railroads determine whether an accident was caused by poor performance of what is traditionally considered a conductor's job function (e.g., switch handling, derail handling, etc.) or whether it was caused by poor performance of what is traditionally considered a locomotive engineer's job function (e.g., operation of the locomotive, braking, etc.)

Subpart D – Denial and Revocation of Certification

This subpart parallels part 240 and part 242's approach to adverse decisions concerning certification (i.e., decisions to deny certification or recertification and revoke certification). With respect to denials, the approach of this rule is predicated principally on the theory that decisions to deny certification or recertification will come at the conclusion of a prescribed evaluation process which will be conducted in accordance with the provisions set forth in this subpart. Thus, this proposed rule contains specific procedures designed to ensure that a person in jeopardy of being denied certification or recertification will be given a reasonable opportunity to examine and respond to the negative information that might serve as the basis for being denied certification or recertification.

When considering revocation, this proposed rule contemplates that decisions to revoke certification will only occur for the reasons specified in this subpart. Since revocation decisions by their very nature involve a clear potential for factual disagreement, this subpart is structured to ensure that such decisions will only come after a certified dispatcher has been afforded an opportunity for an investigatory hearing at which the presiding officer will determine whether there is sufficient evidence to establish that the dispatcher's conduct warranted revocation of their certification.

This subpart also provides for certificate suspension in certain circumstances. Certificate suspension would be employed in instances where there is reason to think the certificate should be revoked or made conditional but time is needed to resolve the situation. Certificate suspension is applicable in instances where a person is awaiting an investigatory hearing to determine whether that person violated certain provisions of FRA's alcohol and drug control rules, or committed a violation of certain operating rules or practices, and situations in which the person is being evaluated or treated for an active substance abuse disorder.

Section 245.301 Process for Denying Certification.

This proposed section, derived from 49 CFR 240.219 and 242.401, establishes minimum procedures that must be offered to a certification candidate before a railroad denies the candidate certification or recertification. Paragraph (a) of this section gives a certification candidate a reasonable opportunity to explain or rebut adverse information, including written documents or records, that the railroad intends to use as the basis for its decision to deny certification or recertification.

Paragraph (b) of this section requires that a written explanation of an adverse decision be ‘served’ on a certification candidate within 10 days of the railroad’s decision. Paragraph (b) also requires that the basis for a railroad’s denial decision address any explanation or rebuttal information that the dispatcher candidate may have provided pursuant to paragraph (a) of this section.

Paragraph (c) of this section prohibits a railroad from denying certification based on a failure to comply with a railroad operating rule or practice which constitutes a violation under § 245.303(e)(1) through (7) if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the dispatcher’s ability to comply with that railroad operating rule or practice. This paragraph is derived from the intervening cause exception for revocation in § 245.307(h).

Section 245.303 Criteria for Revoking Certification.

This proposed section, derived from 49 CFR 240.117, 240.305, and 242.403, provides the circumstances under which a dispatcher may have their certification revoked. In addition, paragraph (a) of this section makes it unlawful to fail to comply with any of the railroad rules or practices described in paragraph (e) of this section. Paragraph (a) is needed so that FRA can initiate enforcement action. For example, FRA might want to initiate enforcement action in the event that a railroad fails to initiate revocation action or a person who is not a certified dispatcher violates a railroad rule or

practice described in paragraph (e) of this section. (Railroads should, however, note that they may not revoke a dispatcher's certificate, including a designated dispatcher's certificate, until they have obtained FRA approval of their certification programs pursuant to § 245.103.)

Paragraph (b) of this section provides that a certified dispatcher who fails to comply with a railroad rule or practice described in paragraph (e) would have their dispatcher certification revoked. Paragraph (c) provides that a certified dispatcher who is monitoring, piloting, or instructing another dispatcher could have their certification revoked if the certified dispatcher fails to take appropriate action to prevent a violation of a railroad rule or practice described in paragraph (e) of this section. As explained in paragraph (c), "appropriate action" does not mean that a supervisor, pilot, or instructor must prevent a violation from occurring at all costs, but rather the duty may be met by warning the dispatcher, as appropriate, of a potential or foreseeable violation.

Paragraph (d) provides that a certified dispatcher who is called by a railroad to perform a duty other than that of a dispatcher would not have their dispatcher certification revoked based on actions taken or not taken while performing that duty. In general, this paragraph would apply regardless of whether the individual was called to perform a certified craft, such as locomotive engineer or conductor, or a non-certified craft. However, this exemption would not apply to violations described in paragraph (e)(8) of this section. Therefore, certified dispatchers working in other capacities, that do not require certification, who violate certain alcohol and drug rules would have their certification revoked for the appropriate period pursuant to § 245.115. However, if the certified dispatcher was working in another certified craft, such as a locomotive engineer or conductor, at the time of the alcohol or drug violation, their certificate for the craft that they were performing at the time of the violation would be revoked as opposed to their dispatcher certificate. If a certified dispatcher who is also certified in another craft, such

as locomotive engineer or conductor, violates § 219.101 while performing a craft that does not require certification, the railroad shall pick one, and only one, certificate to revoke. For example, if a person, who is a certified dispatcher and conductor, violates § 219.101 while working as a brakeman, the railroad must decide to revoke either their dispatcher certificate or their conductor certificate, but it cannot revoke both certificates. Regardless of which certificate the railroad chooses to revoke, the person will be unable to work as a dispatcher or conductor during the period of revocation. *See* § 245.213(d)(1) and (3).

Paragraph (e) provides the eight types of rule infractions that could result in certification revocation. The infractions listed in paragraphs (e)(1) through (8) are derived in part from the revocable events provided in 49 CFR 242.117(e) but have been modified to account for the duties and responsibilities of a dispatcher.

Paragraph (e)(1) refers to a dispatcher's failure to properly protect the public and railroad personnel after receiving a report of highway-rail grade crossing warning system malfunction. Depending on the type of warning system malfunction at issue, this violation could involve the dispatcher's failure to issue a mandatory directive that restricts speed or imposes a stop and flag order for train crews approaching the highway-rail grade crossing.

Paragraph (e)(2) refers to violations that could include a dispatcher granting authority or permission for a train or on-track equipment to enter an out of service or blue flag protected track.

Paragraph (e)(3) refers to violations that could include a dispatcher granting authority or permission for a train or on-track equipment to enter established Roadway Worker In Charge (RWIC) limits without authorization from the RWIC who owns the limits.

Paragraph (e)(4) refers to the removal of blocking devices or established protection of RWIC working limits, prior to the RWIC releasing the limits. Similar to the previous paragraph, this entry is directly correlated to the protection of personnel and equipment on controlled track. In setting up protected limits for an RWIC, dispatchers apply blocking devices which are used to isolate the limits owned by the RWIC. Removing these devices and established protection exposes the RWIC to movements of trains, engines, and on-track equipment.

Paragraph (e)(5) refers to violations that could include the failure of a dispatcher to properly apply blocking devices or establish appropriate protection necessary to protect working limits or the movement of trains or on-track equipment.

Paragraph (e)(6) references a dispatcher's failure to properly issue or apply mandatory directives when warranted. Mandatory directives are defined in § 245.7 as any movement authority or speed restriction that affects a railroad operation. Therefore, any form used to authorize the use of, or provide protection for, controlled track is a mandatory directive. Mandatory directives can be in the form of speed restrictions / slow orders, track authorities, track warrants, and various other movement orders.

Paragraph (e)(7) refers to violations that could include a dispatcher circumventing train control systems by granting permission or authorizing a train or engine with inoperative or malfunctioning PTC or cab signal equipment onto territory requiring the use of these systems.

Paragraph (f) proposes a three-year period for considering certified dispatcher conduct that failed to comply with a railroad operating rule or practice described in paragraphs (e)(1) through (7) of this section. However, when alcohol and drug violations are at issue, the time period for evaluating prior operating rule misconduct would be dictated by § 245.115, which would establish a period of 60 consecutive months prior to the date of review for such evaluations.

Paragraph (g) provides that if a single incident contravenes more than one railroad operating rule or practice listed in paragraph (e) of this section, the incident would be treated as a single violation. FRA considers a single incident to be a unique identifiable occurrence caused by a certified dispatcher's violation of one or more railroad operating rules or practices listed in paragraph (e). However, a certified dispatcher could be involved in more than one incident during a single tour of duty, if the incidents are separated by time, distance, or circumstance.

Paragraph (h) provides that a certified dispatcher may have their certification revoked for violation of a railroad operating rule or practice listed in paragraph (e) that occurs during a properly conducted operational compliance test. However, as reflected in paragraph (i), violations of railroad operating rules or practices that occur during operational tests that are not conducted in compliance with this part, the railroad's operating rules, or the railroad's program under § 217.9 will not be considered for revocation purposes.

Section 245.305 Periods of Ineligibility.

This section of the proposed rule, derived from 49 CFR 240.117 and 242.405, describes how a railroad would determine the period of ineligibility (*e.g.*, for revocation or denial of certification) for a dispatcher or dispatcher candidate. Paragraph (a) of this section provides the starting date for a period of ineligibility. For persons who are not currently certified as dispatchers, a period of ineligibility would begin on the date of the railroad's written determination that the most recent incident has occurred. For example, if the railroad made a written determination on March 10th that the most recent incident occurred on March 1st, the period of ineligibility would begin on March 10th. For persons who are currently certified dispatchers, a period of ineligibility would begin on the date the railroad notifies the person that their recertification has been denied or their certification has been suspended. For dispatchers who have their certification revoked,

the period of ineligibility would begin on the date the railroad notifies the dispatcher of the certificate suspension as opposed to the notification date of certificate revocation because once a person's certificate is suspended, they are ineligible to work as a dispatcher pending a determination as to whether the certificate should be revoked.

With respect to revocation, paragraph (b) of this section provides that once a railroad determines that a dispatcher has failed to comply with its safety rule concerning one or more events listed in § 245.303(e), two consequences will occur. First, the railroad will be required to revoke the dispatcher's certification for a period of time provided in this section. Second, that revocation will initiate a period during which the dispatcher will be subject to an increasingly more severe period of revocation if additional revocable events occur in the next 24 to 36 months. The standard periods of revocation proposed in this section track the revocation periods provided in parts 240 and 242. One revocable event would result in revocation for 30 days. Two revocable events within 24 months of each other would result in revocation for six (6) months. Three revocable events within 36 months of each other would result in revocation of one (1) year. Four revocable events within 36 months of each other would result in revocation for three (3) years.

While paragraph (c) of this section contains a provision that parallels § 242.405(b) and provides that all periods of revocation may consist of training, paragraph (d) contains a provision that parallels §§ 240.117(h) and 242.405(c). Paragraph (d) provides that a person whose dispatcher certification is denied or revoked will be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of revocation if they satisfy all of the criteria listed in the paragraph.

Section 245.307 Process for Revoking Certification.

This proposed section, derived from 49 CFR 240.307 and 242.407, provides the procedures a railroad must follow if it acquires reliable information regarding a

dispatcher's violation of an operating rule or practice listed in §§ 245.303(e) or 245.115(d). Paragraph (b)(1) of this section provides that, upon receipt of reliable information regarding a violation of a railroad operating rule or practice described in §§ 245.303(e) or 245.115(d), a railroad must suspend the person's certificate immediately. Paragraph (b)(2) provides that, prior to or upon suspending the person's certificate, the railroad would have to provide either oral or written notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing. If the initial notice was verbal, then the notice would have to be promptly confirmed in writing. The amount of time the railroad has to confirm the notice in writing would depend on whether or not a collective bargaining agreement is in effect and applicable. In the absence of such an agreement, a railroad would have four days to provide written notice. If a notice of suspension is amended after a hearing is convened and/or does not contain citations to all railroad rules and practices that may apply to a potentially revocable event, the Certification Review Board (CRB or Board), if asked to review the revocation decision, might subsequently find that this constitutes procedural error pursuant to § 245.405.

Pursuant to paragraph (b)(4) of this section, no later than the convening of a hearing, the railroad must provide the dispatcher with a copy of the written information and a list of witnesses the railroad will present at the hearing. If requested, a recess to the start of the hearing shall be granted if the copy of the written information and list of witnesses is not provided until just prior to the convening of the hearing. If the information that led to the suspension of a dispatcher's certificate pursuant to paragraph (b)(1) of this section is provided through statements of an employee of the convening railroad, the railroad must make that employee available for examination during the hearing. Examination may be telephonic or virtual when it is impractical to provide the witness at the hearing. These provisions in paragraph (b)(4) of this section were added to ensure that dispatchers are provided with information and/or witnesses necessary to

defend themselves at their hearing. Even if a railroad conducts a hearing pursuant to the procedures in an applicable collective bargaining agreement, the railroad will still have to comply with the provisions of paragraph (b)(4). It is not, however, FRA's intent to require railroads to call every witness included on the railroad's list of witnesses to testify at the hearing. If, for example, a railroad believes that it has provided sufficient evidence during a hearing to prove its case, and that calling a witness on its list to testify would be unduly repetitive, the railroad would not be obligated to call that witness to testify. Of course, the opposing party could request that the witness be produced to testify, but the hearing officer would have the authority pursuant to paragraph (d)(4) of this section to determine whether the witness's testimony would be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

Paragraph (d)(2) of this section provides the presiding officer with the powers necessary to regulate the conduct of the hearing. Thus, a presiding officer would be permitted to deny excessive hearing request delays by the dispatcher. Moreover, a presiding officer could find implied consent to postpone a hearing when a dispatcher's witnesses are not available within 10 days of the date the certificate is suspended. However, the CRB may grant a petition on review if the CRB finds that the hearing schedule caused the petitioner substantial harm.

Paragraph (e) of this section contains requirements regarding the written decision in a railroad hearing. FRA believes these requirements will ensure that railroads issue clear and detailed decisions. In turn, clear and detailed decisions will allow a dispatcher to understand exactly why their certification was revoked and will allow the CRB to have a more detailed understanding of the case if it is asked to review the revocation decision pursuant to subpart E of this proposed rule.

Paragraph (f) credits the period of certificate suspension prior to the commencement of a hearing required under this section towards satisfying any applicable revocation period imposed in accordance with the provisions of § 245.305. For example, if a dispatcher's certificate is suspended on July 1st and on July 11th, the railroad issues a decision to revoke the dispatcher's certificate for 30 days, the time between July 1st and July 11th would count towards the 30-day revocation period. Thus, the dispatcher's certificate would only be revoked for an additional 20 days after the railroad issued its revocation decision.

Paragraph (g) requires a railroad to revoke a dispatcher's certification if it discovers that another railroad has revoked that person's dispatcher certification. The revocation period shall coincide with the revocation period of the railroad that initially revoked the dispatcher's certification. For example, if a dispatcher is certified by Railroad ABC and Railroad XYZ, and ABC revokes the dispatcher's certification from November 1st through November 30th, XYZ must revoke the dispatcher's certification through November 30th once it learns of ABC's revocation. The revocation hearing requirement in this rule is satisfied when any single railroad holds a revocation hearing for a dispatcher that arises from the same set of facts.

Paragraphs (h) and (i) provide two specific defenses for railroad supervisors and hearing officers to consider when deciding whether to suspend or revoke a person's certificate due to an alleged revocable event. Pursuant to these provisions, either defense would have to be proven by sufficient evidence. Paragraph (h) prohibits railroads from revoking a dispatcher's certificate when there is sufficient evidence of an intervening cause that prevented or materially impaired the dispatcher's ability to comply. For example, a railroad should consider assertions that a Dispatcher Pilot or Dispatcher Trainer failed to take appropriate action to prevent an uncertified dispatcher or dispatcher trainee from using defective equipment. Similarly, a railroad should consider assertions

that a train crew member relayed incorrect information to the dispatcher who reasonably relied on it, thus causing a revocable event. However, FRA does not intend to imply that all equipment failures and errors caused by others will serve to absolve dispatchers from certification revocation under this proposed rule. The factual issues presented by each incident would need to be analyzed on a case-by-case basis.

Paragraph (i) would allow railroads to exercise discretion when determining whether to revoke a dispatcher's certification "if sufficient evidence exists to establish that the violation of the railroad operating rule or practice described in § 245.303(e) was of a minimal nature and had no direct or potential effect on rail safety." However, FRA acknowledges that the determination as to whether an incident meets this criterion could be subject to different interpretations. For this reason, paragraph (j) would require railroads to retain information about the evidence relied upon when exercising this discretion. Unless a railroad fails to retain information as required in paragraph (j) or acts in bad faith, FRA does not anticipate taking enforcement action against the railroad even if FRA believes the railroad could have revoked the dispatcher's certification.

Paragraph (j) of this section requires railroads to keep records of those violations in which they must not or elect not to revoke a dispatcher's certificate pursuant to paragraph (h) or (i) of this section. Paragraph (k) addresses concerns that problems could arise if FRA disagrees with a railroad's decision not to suspend a dispatcher's certificate for an alleged violation of an operating rule or practice pursuant to § 245.303(e). As long as a railroad makes a good faith determination after a reasonable inquiry, the railroad will have immunity from civil enforcement for making what the agency believes to be an incorrect determination. However, if railroads do not conduct a reasonable inquiry or act in good faith, they could be subject to civil penalty assessment under this rule. In addition, even if a railroad does not take what FRA considers appropriate revocation action, FRA could still take enforcement action against an individual responsible for the

noncompliance by assessing a civil penalty against the individual or issuing an order prohibiting the individual from performing safety-sensitive functions in the rail industry for a specified period pursuant to part 209, subpart D.

Subpart E – Dispute Resolution Procedures

This subpart details the opportunities and procedures for a person to challenge a railroad's decision to deny certification or recertification or to revoke a dispatcher's certification. While the proposed dispute resolution process for dispatchers largely mirrors the processes for engineers under part 240 and conductors under part 242, FRA has made some modifications that will be discussed below. In addition, FRA has undertaken efforts to simplify these regulations so that they are clear and comprehensible to all interested parties.

Section 245.401 Review Board Established.

This proposed section, derived from 49 CFR 240.401 and 242.501, provides that a person who is denied certification or recertification or has had their dispatcher certification revoked may petition FRA to review the railroad's decision. Pursuant to this section, FRA delegates initial responsibility for adjudicating such disputes to the CRB. Although creation of the CRB will require issuance of an internal FRA order, FRA anticipates that the CRB will mirror the Operating Crew Review Board (OCRB) which currently adjudicates disputes under parts 240 and 242.²⁰ Under this proposed rule, this newly created Board would adjudicate certification disputes for all certified crafts, including locomotive engineers, conductors, and dispatchers. FRA is fully aware that these different job disciplines require different knowledge bases and skill sets. While the specific process for selecting CRB members would be delineated in an FRA order or other internal document, FRA would ensure that the CRB is composed of employees with

²⁰ In a future rulemaking, FRA expects to revise parts 240 and 242 to refer to the CRB instead of the OCRB.

sufficient backgrounds in these various disciplines. Only those CRB members with sufficient knowledge of dispatching would be able to participate as a voting member on a petition filed under this part.

Section 245.403 Petition Requirements.

This proposed section, derived from 49 CFR 240.403 and 242.503, provides the requirements for obtaining FRA review of a railroad's decision to deny certification, deny recertification, or revoke certification. The requirements contained in paragraph (b) of this section include the need to seek review in a timely fashion once the adverse decision is served on the petitioner. In the interest of consistency and uniformity with parts 240 and 242, petitioners under this part would have 120 days, from the date the adverse decision was served upon them, to file a petition for review by the CRB.

Paragraph (b)(3) provides that a petitioner must file their petition through <https://www.regulations.gov>. Petitioners and their representatives should save some form of proof of their filing in case an error occurs in the Regulations.gov system and they have to submit proof that their petition was timely filed. All documents associated with a CRB petition will be posted to the docket for that case on Regulations.gov and all DOT dockets on Regulations.gov are available to the public. You may review DOT's complete Privacy Act Statement published in the *Federal Register* on April 11, 2000 (Volume 65, Number 70, Pages 19477-78).

Paragraph (b)(4) requires that a petition contain certain contact information, including an email address, for the petitioner and their representative, if any. The OCRB solely communicates with parties via email. FRA anticipates that the CRB will operate in a similar manner, and will only send communications to the parties via email. If a petition only contains an email address for the petitioner's representative, but not the petitioner, the CRB will only send any necessary communications to the representative. Because all communications will be performed via email, FRA has determined that it is

unnecessary for a petition to include a mailing address for petitioner or their representative. Thus, unlike in parts 240 and 242, this information will not be required.²¹ Lastly, if any required contact information for petitioner or their representative, such as a phone number or email address, changes during the pendency of a petition before the CRB, it is the responsibility of the petitioner or their representative to provide the CRB and the railroad with the new contact information.

Paragraph (b)(6) requires petitioners or their representatives to state the facts and arguments in support of their petition. In other words, they need to explain to the CRB why they think the railroad was incorrect in denying or revoking the petitioner's certification. Paragraph (b)(7) requires petitioners to submit all documents related to the railroad's decision that are in their possession or reasonably available to them. This potentially includes the transcript and exhibits from the petitioner's denial or revocation hearing. In most cases, these documents will be essential to the Board's ability to make an informed decision on the petition. If neither the petitioner nor the railroad provides these documents, the Board may have to specifically request these documents. Such a request is likely to delay the Board's adjudication of the petition. Therefore, it is in the petitioner's interest to provide the Board with these documents as part of their petition.

Paragraph (c) of this section was added to clarify a petitioner's responsibilities, if requested by the CRB, with respect to a petition seeking review of a railroad decision that is based on a failure to comply with any drug or alcohol related rules or a return-to-service agreement. It provides that, if requested by the CRB, a petitioner must supplement the petition with "a copy of the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees." This paragraph also provides that a petitioner must provide a written

²¹ In a future rulemaking, FRA expects to revise Parts 240 and 242 to conform to the electronic communication requirements of this rulemaking.

explanation in response to a CRB request if they do not supply the Board with the written documents that should be reasonably available under 49 CFR 40.329.

Paragraph (d) of this section gives the CRB discretion to grant a request for additional time to file a petition if certain circumstances are met. As an initial matter, the petitioner must put forth good cause for granting the extension. Thus, a petitioner will have to demonstrate a reasonable justification for granting the extension of time. This justification should be as detailed as possible to assist the Board in its determination. In addition to showing good cause for an extension, a petitioner must either submit their extension request before the deadline for filing their petition or, if the deadline has already passed, they must allege facts constituting “excusable neglect” for failing to meet the deadline. The mere assertion of excusable neglect, unsupported by facts, will be insufficient. Excusable neglect requires a demonstration of good faith on the part of the party seeking an extension of time, and some reasonable basis for noncompliance within the time frame specified in the rules. Absent a showing along these lines, relief will be denied. The Board will make determinations on whether “good cause” and/or “excusable neglect” has been shown on a case-by-case basis.

Paragraph (e) of this section explains that a decision by the CRB to deny a petition for untimeliness or lack of compliance with the requirements of § 245.403 may be appealed directly to the FRA Administrator. Normally an appeal to the Administrator can only occur after a case has been heard by FRA’s hearing officer. However, petitions that the Board finds to be untimely or incomplete are the two exceptions where a party can skip petitioning the hearing officer and go directly to filing an appeal with the Administrator.

Section 245.405 Processing Certification Review Petitions.

This section of the proposed rule, derived from 49 CFR 240.405 and 242.505, details how petitions for review by the CRB will be handled. Paragraph (a) of this

section notes that when FRA receives a CRB petition, it will send a written notification to the parties involved in the petition. FRA will send these acknowledgments via email. If a representative files a petition on behalf of a petitioner, the petition must include the petitioner's email address, if the petitioner also wants to receive the acknowledgment email and any other correspondence (including the Board's decision) from FRA. The acknowledgment email will include the docket number for the petition so that both parties can access the documents in the case on <https://www.regulations.gov>. FRA will not send a copy of the petition to the railroad.

Paragraph (b) of this section provides railroads with the opportunity to respond to a petition. While it is always optional for a railroad to respond to a petitioner's arguments, if the petitioner did not include relevant documents in their petition, such as hearing transcripts or exhibits, the railroad is required to provide FRA with those documents, even if it does not otherwise respond to the arguments in the petition. Railroads would have 60 days, from the date FRA sends the acknowledgment email, to file a response in the docket on <https://www.regulations.gov>. Railroads may submit responses after the 60-day deadline, but the Board will only review such late filings if it is practicable. In other words, there is no guarantee that the Board will review a late response prior to issuing a decision; thus, if a railroad wishes to respond to a petition, it should meet the 60-day deadline. The railroad can fulfill its requirement to serve a copy of its response on the other party by sending its response to petitioner and/or petitioner's representative via email.

Paragraph (c) of this section specifies when a case will be referred to the Board, and what authority the Board has to decide on a petition. If a railroad files a response before the 60-day deadline in paragraph (b) of this section, the petition will be referred to the Board upon receipt of the response. Otherwise, the petition will be referred to the Board 60 days after the date the acknowledgment email was sent. The Board has the

authority to grant a petition (rule in favor of the petitioner), deny a petition (rule in favor of the railroad), or dismiss a petition. An example of when the Board would dismiss a petition would be if the railroad did not deny or revoke the petitioner's certification, and thus, there was no case or controversy before the Board. If there is insufficient evidence of record for the Board to make a decision on the merits of a petition, the Board may choose to remand a petition or issue an interim order, so that additional fact-finding can occur.

Paragraphs (d), (e), and (f) of this section provide the standards of review that the Board will employ for procedural issues, factual issues, and legal issues, respectively. These standards mirror the standards of review used by the OCRB to review locomotive engineer and conductor petitions. It is not the Board's intention to correct all procedural errors committed by a railroad. Instead, the Board will only grant a petition if the railroad's procedural error caused substantial harm to the petitioner. For factual issues, the petitioner must show that the railroad did not have substantial evidence to support its decision to deny or revoke the petitioner's certification. If the Board must decide a legal issue, it will perform *de novo* review, meaning that it will not give deference to any decision or interpretation made by the railroad.

Paragraph (g) of this section acknowledges that the Board's decision-making power is limited to granting or denying a petition. In other words, the Board is only empowered to make determinations concerning qualifications under this regulation. The Board is not empowered to mitigate the consequences of a railroad decision if the decision was valid under this regulation. The contractual consequences, if any, of these determinations would have to be resolved under dispute resolution mechanisms that do not directly involve FRA. For example, FRA cannot order a railroad to alter its seniority rosters or make an award of back pay, in the event of a finding that a railroad wrongfully denied certification.

Paragraph (h) of this section notes that the Board will issue a written decision that will be served on both parties. FRA will send the decision to the parties by email and it will also be posted in the case's docket on <https://www.regulations.gov>.

Section 245.407 Request for a Hearing.

This proposed section, derived from 49 CFR 240.407 and 49 CFR 242.507, provides that a party who has been adversely affected by a CRB decision will have the opportunity to request an administrative proceeding as prescribed in § 245.509.

Paragraph (b) of this section gives the instructions and the deadline for submitting a hearing request. Just like with CRB petitions, parties must file hearing requests electronically. To file a hearing request, the adversely affected party should upload the request to the docket on <https://www.regulations.gov> that was used while the case was before the Board. This docket will also be used to file documents while the case is before the hearing officer. After the 20-day deadline to file a hearing request has passed, FRA will check the docket on <https://www.regulations.gov> to see if a hearing request was filed. Paragraph (c) of this section contains the requirements for a hearing request, which includes the docket number for the case while it was before the Board. Paragraph (c) also requires the signature of the requesting party or their representative. FRA will accept electronic signatures for purposes of satisfying this requirement.

Paragraph (d) of this section notes that FRA will arrange for the appointment of a presiding officer, and it will be the presiding officer's duty to schedule a hearing for the earliest practicable date. Paragraph (e) of this section provides that a party who fails to request an administrative hearing in a timely fashion will lose the right to further administrative review and the CRB's decision will constitute final agency action.

Section 245.409 Hearings.

This section of the proposed rule, derived from 49 CFR 240.409 and 49 CFR 242.509, describes the authority of the presiding officer to conduct an administrative

hearing and the procedures by which the administrative hearing will be governed.

Paragraph (b) of this section provides that the proceeding will afford an aggrieved party a *de novo* hearing at which the relevant facts will be adduced, and the correct application of this part will be determined. In instances when the issues are purely legal, or when only limited factual findings are necessary to determine issues, the presiding officer may determine the issues following an evidentiary hearing only on the disputed factual issues, if any. The presiding officer can therefore grant full or partial summary judgment.

Paragraph (d) of this section provides that the presiding officer may authorize discovery. It also authorizes the presiding officer to sanction willful noncompliance with permissible discovery requests. Paragraph (e) of this section requires that documents in the nature of pleadings be signed. This signature can be electronic and will constitute a certification of factual and legal good faith. Paragraph (f) of this section provides the requirement for service and for certificates of service. Paragraph (g) of this section expresses the presiding officer's authority to address noncompliance with a law or directive. This provision is intended to ensure that the presiding officer will have the authority to control the proceeding so that an efficient and fair hearing is conducted.

Paragraph (h) of this section states the right of each party to appear and be represented. Paragraph (i) of this section protects witnesses by ensuring their right of representation and their right to have their representative question them. Paragraph (j) of this section allows any party to request consolidation or separation of hearings of two or more petitions when to do so would be appropriate under established jurisprudential standards. This option is intended to allow more efficient determination of petitions in cases where a joint hearing would be advantageous.

Under paragraph (k) of this section, the presiding officer could, with certain exceptions, extend periods for action required in the proceedings, provided substantial prejudice would not result to a party. The authority to deny an extension request

submitted after a deadline has already passed shows the preference for use of this authority to provide extensions of time as a tool to alleviate unforeseen or unnecessary burdens, and not as a remedy for inexcusable neglect.

Paragraph (l) of this section establishes a motion as the appropriate method for requesting action by the presiding officer. This paragraph also provides the form of motions and the response period for written motions. Paragraph (m) of this section provides rules for the mode of hearing and record maintenance, including requirements for sworn testimony, verbatim record (including oral testimony and argument), and inclusion of evidence or substitutes therefor in the record. Paragraph (n) of this section directs the presiding officer to employ specific rules of evidence as guidelines for the introduction of evidence, and permits the presiding officer to determine what evidence may be received. Further, paragraph (o) of this section provides additional powers the presiding officer may exercise during the proceedings.

Paragraph (p) of this section provides that the petitioner before the CRB, the railroad that took the certification action at issue, and FRA are mandatory parties to the administrative proceeding. Paragraph (q) of this section states what party will be the hearing petitioner and what parties will be the respondents. If the Board granted the petition, the railroad will be the hearing petitioner and the dispatcher or dispatcher candidate will be a respondent. If the Board denied the petition, the dispatcher or dispatcher candidate will be the hearing petitioner and the railroad will be a respondent. The actions of the dispatcher and the railroad will be at issue in the hearing—not the actions of the CRB. Thus, it is appropriate that the dispatcher and the railroad fill the roles of petitioner and respondent for the hearing.

Paragraph (q) also provides that FRA will be a mandatory party in the proceeding. In all proceedings, FRA will initially be considered a co-respondent. If, based on evidence acquired after the filing of a hearing petition, FRA concludes that the public

interest in safety is more closely aligned with the position of the petitioner than the respondent, FRA can request that the hearing officer exercise their inherent authority to realign parties for good cause shown. However, FRA anticipates that such a situation would rarely occur. FRA represents the interests of the government; hence, parties and their representatives will have to be careful to avoid ethical dilemmas that might arise due to FRA's ability to realign itself. Paragraph (q) also notes that the party requesting the hearing has the burden of proving its case by the preponderance of evidence.

Paragraph (r) of this section gives the presiding officer authority to close the record in a case. Paragraph (s) of this section provides the presiding officer with the authority to issue a decision and includes requirements for that decision.

Section 245.411 Appeals.

This proposed section, derived from 49 CFR 240.411 and 49 CFR 242.511, permits any party aggrieved by the presiding officer's decision to file an appeal with the FRA Administrator. Paragraph (a) of this section provides that if no appeal is timely filed, the presiding officer's decision will constitute final agency action. The appeal shall be filed in the same docket on <https://www.regulations.gov> used when the case was before the Board and the presiding officer.

Paragraph (b) of this section allows for a party to reply to the appeal. Paragraphs (c) and (d) of this section describe the Administrator's authority to conduct the proceedings of an appeal. Paragraph (e) of this section addresses the Administrator's different options for ruling on an appeal. The phrase "except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted" is included in this rule so that parties understand that a remand, or other intermediate decision, will not constitute final agency action. The inclusion of this phrase clarifies this potential outcome to those parties that are not represented by an attorney or who might otherwise

be confused as to whether any action taken by the Administrator should be considered final agency action.

Paragraph (f) of this section provides instructions for how appeals to the Administrator that come directly from the CRB should be handled. The only cases that can go directly from the Board to the Administrator are cases where the Board denied a petition for being untimely or incomplete. If the Administrator vacates and remands the Board's decision, the case will return to the Board. If the Administrator affirms the Board's decision, that will constitute final agency action.

Appendices

FRA has included two appendices with this proposed rule.

Appendix A, derived from appendix C to part 240 and appendix C to part 242, provides a narrative discussion of the procedures that a person seeking certification or recertification should follow to furnish a railroad with information concerning their motor vehicle driving record. Appendix B, derived from appendix D to part 240 and appendix D to part 242, provides a narrative discussion of the procedures that a railroad is required to employ in administering the vision and hearing requirements of § 245.117 and § 245.118. The main issue addressed in this appendix is discussing test methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry.

V. Regulatory Impact and Notices

A. Executive Order 12866 as Amended by Executive Order 14094

This proposed rule is not a significant regulatory action within the meaning of Executive Order 12866 as amended by Executive Order 14094, Modernizing Regulatory Review. Details on the estimated costs of this NPRM can be found in the Regulatory Impact Analysis (RIA), which FRA has prepared and placed in the docket (FRA-2022-0019).

FRA is proposing regulations establishing a formal certification process for railroad dispatchers. As part of that process, railroads would be required to develop a program for training current and prospective dispatchers, documenting and verifying that the holder of the certificate has achieved certain training and proficiency, and creating a record of safety compliance infractions that other railroads can review when considering individuals for certification. This proposed regulation would ensure that dispatchers are properly trained, are qualified to perform their duties, and meet Federal safety standards. Additionally, this proposed regulation is expected to improve railroad safety by reducing the rate of accidents/incidents.

The RIA presents estimates of the costs likely to occur over the first 10 years of the proposed rule. The analysis includes estimates of costs associated with development of certification programs, initial and periodic training, knowledge testing, and monitoring of operational performance. Additionally, costs are estimated for vision and hearing tests, review of certification determinations made by other railroads, and Government administrative costs.

FRA estimated 10-year costs of \$5.3 million discounted at 7 percent. The annualized cost would be \$0.8 million discounted at 7 percent. The following table shows the estimated 10-year costs of the proposed rule.

Total 10-Year Discounted Costs (2020 Dollars)

Category	10-Year Cost (\$)	Present Value 7% (\$)	Present Value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
Development of Certification Program	976,996	929,395	953,949	132,325	111,832
Certification Eligibility Requirements	67,860	55,360	61,963	7,882	7,264
Recertification Eligibility Requirements	101,515	65,831	83,877	9,373	9,833
Training	910,415	707,334	812,820	100,708	95,287
Knowledge Testing	327,028	233,988	281,581	33,315	33,010
Vision and Hearing	2,217,910	1,586,913	1,909,692	225,941	223,874
Monitoring Operational Performance	353,656	256,017	305,956	36,451	35,867

Railroad Oversight Responsibilities	383,510	267,530	326,714	38,090	38,301
Certification Card	37,501	26,832	32,289	3,820	3,785
Petitions and Hearings	11,325	8,198	9,797	1,167	1,149
Government Administrative Cost	1,505,376	1,208,191	1,361,239	172,019	159,579
Total	6,893,092	5,345,589	6,139,877	761,092	719,781

The primary benefit of this proposed rule is that it would ensure that railroads properly train and monitor dispatcher performance to reduce the risk of accidents caused by dispatcher error. This rule would allow railroads to revoke certification of dispatchers who make serious safety-related violations. This includes failure to protect a malfunctioning highway-rail grade crossing or incorrectly granting permission to proceed through a protected track segment.

This rule is expected to reduce the likelihood of an accident occurring due to dispatcher error. FRA has analyzed accidents over the past five years to categorize those where dispatcher training and certification would have impacted the accident. FRA estimated that this rule would prevent 30% of accidents that were caused or likely caused by the dispatcher. FRA estimated that this rule would prevent 10% of accidents where a dispatcher may have contributed to the accident.

The following table shows the estimated 10-year benefits of the proposed rule. The total 10-year estimated benefits would be \$0.8 million (PV, 7%) and annualized benefits would be \$0.1 million (PV, 7%).

Total 10-Year Discounted Benefits (2020 Dollars)

Present Value 7% (\$)	Present Value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
785,599	918,450	111,852	107,670

FRA has quantified the monetary impact from accidents reported on FRA accident forms. However, some accident costs are not required to be reported on FRA accident forms (e.g., environmental impact). For example, the cost of property damage

represents a portion of the total cost of train accidents, such as, the cost of direct labor and damage to on-track equipment, track, track structures, and roadbed. Other direct accident costs, such as accident clean up, third party property damage, lost lading, environmental damage, loss of economic activity to the community, and train delays are not included in FRA's accident/incident reportable damages from the railroads. That impact may account for additional benefits not quantified in this analysis. If these costs not covered by FRA data were realized, accidents affected by this proposed rulemaking could have much greater economic impact than the quantitative benefit estimates provided here.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and EO 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA prepared this IRFA to facilitate public comment on the potential small business impacts of the requirements in this NPRM.

FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from adoption of the proposals in this NPRM. FRA particularly encourages small entities that could potentially be impacted by the proposed rule to participate in the public comment process. FRA will consider all information and comments received in the public comment process when making a determination of the economic impact on small entities.

1. Reasons for Considering Agency Action

FRA is concerned with the potential for accidents caused by dispatcher error. Railroads' dispatcher training programs may not be covering all aspects of a dispatcher's job responsibility. Additionally, railroads may not be testing dispatchers and ensuring that their knowledge is maintained continuously. The risk from job-hopping of a dispatcher with a substance abuse problem is also addressed by the proposed rule.

This NPRM would require railroads to develop a dispatcher certification program. This proposed rule would ensure that railroads examine railroad safety with respect to dispatchers. If FRA did not issue the rule as proposed, railroads would be free to hire and train dispatchers as they see fit.

2. A Succinct Statement of the Objectives of, and the Legal Basis for, the Proposed Rule

This proposed rule is expected to help reduce the rate of dispatcher-caused accidents. The annual operational performance monitoring would ensure that dispatchers maintain their knowledge after the initial certification process.

FRA is proposing regulations concerning dispatcher certification based on the general statutory authority of the Secretary. The general authority states, in relevant part, that the Secretary "as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970."²² The Secretary delegated this authority to the Federal Railroad Administrator.²³ In addition, section 402 of the RSIA grants the Secretary authority to prescribe regulations requiring the certification of certain crafts or classes, including dispatchers, to improve railroad safety.

3. A Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply

²² 49 U.S.C. 20103.

²³ 49 CFR 1.89(a).

The Regulatory Flexibility Act of 1980 requires a review of proposed and final rules to assess their impact on small entities, unless the Secretary certifies that the rule would not have a significant economic impact on a substantial number of small entities. “Small entity” is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a “small entity” in the railroad industry is a for profit “line-haul railroad” that has fewer than 1,500 employees, a “short line railroad” with fewer than 1,500 employees, a “commuter rail system” with annual receipts of less than \$16.5 million dollars, or a contractor that performs support activities for railroads with annual receipts of less than \$16.5 million.²⁴

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Under that authority, FRA has published a proposed statement of agency policy that formally establishes “small entities” or “small businesses” as railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1-1, which is \$20 million or less in inflation-adjusted annual revenues,²⁵ and commuter railroads or small Governmental jurisdictions that serve populations of 50,000 or less. *See* 68 FR 24891 (May 9, 2003) (codified at appendix C to 49 CFR part 209). FRA is using this definition for the proposed rule.

²⁴ U.S. Small Business Administration, “Table of Small Business Size Standards Matched to North American Industry Classification System Codes, August 19, 2019. https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%202019,%202019.pdf.

²⁵ The Class III railroad revenue threshold is \$40.4 million or less, for 2021. (The Class II railroad threshold is between \$40.4 million and \$900 million.) Surface Transportation Board (STB), available at <https://www.stb.gov/news-communications/latest-news/pr-21-16/>.

When developing the proposed rule, FRA considered the impact that the proposed rule would have on small entities.

The proposed rule would be applicable to all railroads who perform dispatching operations. However, the majority of small railroads do not have a dispatching function as part of their operations. The remaining small railroads would only be minimally impacted as most of their dispatch operations are contracted out to third parties. FRA estimates there are 744 Class III railroads, of which 704 operate on the general system. These railroads are of varying size, with some belonging to larger holding companies. Approximately 140 Class III railroads would be impacted by this rulemaking because they have dispatchers on staff or use third parties to dispatch trains for their operation. The remaining Class III railroads operate on track owned by Class I railroads or do not have a dispatching function as part of their operation. For those railroads operating on Class I track, the host railroad would be responsible for the dispatching on those tracks; therefore, the smaller railroad would not require a dispatcher certification program.

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Class of Small Entities That Would be Subject to the Requirements and the Type of Professional Skill Necessary for Preparation of the Report or Record

Railroads would be required to submit information to FRA for approval of dispatching certification programs. For small railroads that choose to develop their own certification programs, they would likely be less complex than larger railroads' operations. This would ease some of the burden on small railroads.

The training program, and annual railroad responsibilities would be prepared by a professional or administrative employee. The type of professional skills needed by an employee responsible for submitting a special approval request includes the ability to

plan and organize work. Such an employee would also need good verbal and written communication skills and attention to detail.

Summary of Class III railroad costs

Class III Railroads would have all the same cost components as larger railroads except they would not be required to perform annual railroad oversight responsibilities in accordance with the proposed rule. Therefore, that cost has been excluded for Class III railroads.

The following table shows the annualized cost for Class III railroads over the 10-year analysis period. The total estimated 10-year costs for Class III railroads would be \$0.8 million and the annualized cost for all Class III railroads would be \$118,984 (PV, 7 percent).

Total 10-Year and Annualized Costs, Class III Railroads

Category	Present Value 7% (\$)	Annualized 7% (\$)
Development of Certification Program	100,579	14,320
Certification Eligibility Requirements	13,840	1,971
Recertification Eligibility Requirements	16,458	2,343
Training	176,834	25,177
Knowledge Testing	58,497	8,329
Vision and Hearing	396,728	56,485
Monitoring Operational Performance	64,004	9,113
Certification Card	6,708	955
Petitions and Hearings	2,050	292
Total	835,697	118,984

The industry trade organization representing small railroads, ASLRRRA, reports the average freight revenue per Class III railroad is \$4.75 million.²⁶ The following table summarized the average annual costs and revenue for Class III railroads.

²⁶ American Short Line and Regional Railroad Association, *Short Line and Regional Railroad Facts and Figures*, p. 10 (2017 pamphlet).

Average Class III Railroads' Costs and Revenue

Total Cost for Class III Railroads, Annualized 7% (\$)	Number of Class III Railroads with Dispatcher Plans	Average Annual Cost per Class III Railroad (\$)	Average Class III Annual Revenue (\$)	Average Annual Cost as a Percent of Revenue
A	B	c = a ÷ b	d	e = c ÷ d
118,984	140	850	4,750,000	0.02%

The average annual cost for a Class III railroad impacted by this rule would be \$850. This represents a small percentage (0.02%) of the average annual revenue for a Class III railroad.

The estimates above show that the burden on Class III railroads would not be a significant economic burden. FRA requests comments on this estimate and will consider all comments when making a determination for the final rule.

5. Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict with the Proposed Rule

FRA is not aware of any relevant Federal rule that duplicates, overlaps with, or conflicts with this NPRM. This proposed rule is complementary to, rather than duplicative of, other recent regulatory initiatives FRA has issued or is in the process of developing. These initiatives include: the implementation of positive train control (PTC) systems by required railroads;²⁷ training, qualification, and oversight;²⁸ railroad safety risk reduction programs;²⁹ and the development of fatigue risk management programs.³⁰

6. A Description of Significant Alternatives to the Rule

²⁷ See generally 49 CFR part 236, subpart I; and press release in which FRA announces full implementation of positive train control (Dec. 29, 2020), available at <https://railroads.dot.gov/sites/fra.dot.gov/files/2020-12/fra1920.pdf>.

²⁸ 49 CFR part 243.

²⁹ 49 CFR parts 270 and 271.

³⁰ 87 FR 35660 (Jul. 13, 2022) (final rule amending 49 CFR parts 270 and 271 to require certain railroads to develop and implement a Fatigue Risk Management Program as one component of the railroads' larger railroad safety risk reduction programs).

This analysis considered two alternatives to the rule: the baseline approach, and an approach that would certify just the training program. The baseline alternative (no action) would not ensure that dispatchers are being properly trained. Without this rule, railroad operations may be less safe if railroads are not providing adequate training to their dispatchers.

The alternative of certifying only the training program would require a railroad to enhance their training of dispatchers. Training, however, is only a part of the certification process. The additional requirements of this proposed rule would ensure that dispatchers' hearing, vision, prior safety conduct at other railroads, and other aspects have been reviewed and are consistent with railroad safety.

C. Paperwork Reduction Act

FRA is submitting the information collection requirements in this proposed rule to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1995.³¹ The entire table contains the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section	Respondent universe	Total annual responses (A)	Average time per responses (B)	Total annual burden hours (C) = A * B	Wage rate (D) ³²	Total cost equivalent (E) = C * D
245.9—Waivers—Petitions	203 railroads	.33 petitions	3 hours	1.00 hour	\$77.44	\$77.44
245.101/.103—Certification program required and FRA review of certification program—Development of certification program in accordance with this Part and procedures	203 railroads + ASLRRRA and holding companies	71 plans (14.33 Class I and commuter railroads plans + 3.33 generic program developed by ASLRRRA and holding companies plans + 53.33 Class II	120 hours + 120 hours + 6 hours	2,439.18 hours	\$115.24	\$281,091.10

³¹ 44 U.S.C. 3501 *et seq.*

³² Throughout the tables in this document, the dollar equivalent cost is derived from the 2020 Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75-percent overhead charges.

contained under § 245.107 — Railroads with Current Dispatching Operations and New Dispatching Railroads (Note: Each certification program includes procedure requirements under § 245.111 through § 245.121.)		and III railroads plans)				
—(d)(1) Dispatcher certification submission— Copies of the program provided to the president of each rail labor organization (RLO) that represents the railroad’s employees that are subject to this part	203 railroads	3 copies	15 minutes	.75 hours	\$77.44	\$58.08
—(d)(2) Affirmative statements that the railroad has provided a copy of the program to RLOs	203 railroads	3 affirmative statements	15 minutes	.75 hours	\$77.44	\$58.08
—(e) Comment Period—Affirmed comments on a railroad’s program by any designated representative of employees subject to this part or any directly affected employee who does not have a designated representative	203 railroads	12 comments	4 hours	48.00 hours	\$77.44	\$3,717.12
—(g) Material Modifications of FRA-approved program—Railroad to submit a description of how it intends to modify the program and a copy of the modified program to FRA	The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.					

—(h) Resubmission— Railroad can resubmit its program or material modification as described in paragraph (f)(2) of this section after addressing all of the deficiencies noted by FRA and the resubmission must conform with the procedures and requirements contained in § 245.107	203 railroads + ASLRRRA and holding companies	4.67 revised plans (3.67 revised plans Class I and commuter railroads + 1 revised plan ASLRRRA and holding companies)	20 hours	94.00 hours	\$77.44	\$7,279.36
—(i) Rescinding Prior Approval of Program—Railroad to resubmit its certification program and the program must conform with the procedures and requirements contained in § 245.107	The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.					
245.105 (c)(1)-(d)(1)— Implementation schedule for certification programs— Designation of certified dispatcher	203 railroads	522 designated lists	5 minutes	43.50 hours	\$77.44	\$3,368.64
—(c)(2)-(d)(2) Issue a certificate that complies with § 245.207 to each person that it designates	203 railroads	522 issued certificate cards	3 minutes	26.10 hours	\$77.44	\$2,021.18
—(f) Written requests for delayed certification— Railroad may wait to recertify the person making the request until the end of the three-year period after FRA has approved the railroad's certification program	FRA anticipates zero submissions.					

—(g) Testing and evaluation— Railroad shall only certify or recertify a person as a dispatcher if that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part	The paperwork burden for testing and evaluation is included in the economic burden and the burden for certificates is included under § 245.105.					
245.107— Requirements for Certification Programs— Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data	The paperwork requirements described in this appendix are accounted for throughout this table.					
245.109(a)— Determinations required for certification and recertification— Eligibility requirements	The paperwork burden for this requirement is covered under § 245.111 through § 245.121 and § 245.303.					
—(b) Person entering into an agreement that results in a railroad obtaining the information needed for compliance with this subpart in a different manner than that prescribed in § 245.111 or § 245.113	As a condition of employment, dispatchers will sign an agreement upon being hired. There is no paperwork burden since this is the usual and customary procedure.					
245.111(a)-(c)— Prior safety conduct as motor vehicle operator— Eligibility requirements of this section involving prior conduct as a motor vehicle operator	203 railroads	522 motor vehicle records	5 minutes	43.50 hours	\$77.44	\$3,368.64
—(e) If driver information is not obtained as required pursuant to paragraph (g) of this section, that person or the railroad certifying or recertifying that person may petition	203 railroads	2 waivers	2 hours	4.00 hours	\$77.44	\$309.76

for a waiver in accordance with the provisions of part 211 of this chapter						
—(f) Individual's duty—Consent to make information concerning driving record available to that railroad	This is usual and customary procedure. The consent form is signed at the time of hiring to make driving information available to the railroad.					
—(g)-(h) Request to obtain driver's license information from licensing agency	203 railroads	522 written requests	5 minutes	43.50 hours	\$59.00	\$2,566.50
—(i) Requests for additional information from licensing agency	The paperwork burden for this requirement is included under § 242.111(g)-(h).					
—(j) Notification to railroad by persons of never having a license	203 railroads	2 notices	10 minutes	.33 hours	\$77.44	\$25.56
—(k) Report of motor vehicle incidents described in paragraphs (m)(1) and (2) of this section to the employing railroad within 48 hours	203 railroads	10 self-reports	10 minutes	1.67 hours	\$77.44	\$129.32
—(l)-(m) Evaluation of person's driving record by railroad	203 railroads	522 motor vehicle record evaluations	5 minutes	43.50 hours	\$71.89	\$3,127.22
—(n)(1) DAC referral by railroad after report of driving drug/alcohol incident	203 railroads	9 DAC referrals	5 minutes	.75 hours	\$115.24	\$86.43
—(n)(2) DAC request and supply by persons of prior counseling or treatment	203 railroads	1 request and supplied record	30 minutes	.50 hours	\$115.24	\$57.62
—(n)(3) Conditional certifications recommended by DAC	203 railroads	3 conditional certification recommendations	4 hours	12.00 hours	\$115.24	\$1,382.88
245.113(b)—Prior safety conduct as an employee of a different railroad—Certification candidate has not been employed or certified by any other railroad in the previous five years,	This is usual and customary procedure and, therefore, there is no paperwork burden.					

they do not have to submit a request in accordance with paragraph (c) of this section, but they must notify the railroad of this fact in accordance with procedures established by the railroad in its certification program						
—(c) Person seeking certification or recertification under this part shall submit a written request to each railroad that employed or certified the person within the previous five years	203 railroads	3.33 requests	15 minutes	.83 hours	\$77.44	\$64.28
—(e) and (g) Railroad shall provide the information requested to the railroad designated in the written request	203 railroads	3.33 records	15 minutes	.83 hours	\$77.44	\$64.28
—(f) An explanation shall state why the railroad cannot provide the information within the requested time frame or cannot provide the requested information	FRA anticipates zero submissions.					
245.115(a)— Substance abuse disorders and alcohol drug rules compliance— Determination that person meets eligibility requirements	203 railroads	459 determinations	2 minutes	15.30 hours	\$77.40	\$1,184.22
—(b) Written documents from DAC that person is not affected by a disorder	203 railroads	20 filed documents	30 minutes	10.00 hours	\$115.24	\$1,152.40

—(c)(3) Fitness requirement— Voluntarily self-referral by dispatcher for substance abuse counseling or treatment under the policy required by § 219.1003 of this chapter	203 railroads	1 self-referral	10 minutes	.17 hours	\$115.24	\$19.59
—(d)(1)-(d)(2) Prior alcohol/drug conduct; Federal rule compliance	203 railroads	522 certification reviews	10 minutes	87.00 hours	\$115.24	\$10,025.88
—(d)(3)(i) Written determination that most recent incident has occurred	203 railroads	8 written determinations	1 hour	8.00 hours	\$115.24	\$921.92
—(d)(3)(ii) Notification to person that recertification has been denied	203 railroads	8 notifications	30 minutes	4.00 hours	\$77.44	\$309.76
—(d)(4) Persons/conductors waiving investigation/de-certifications	203 railroads	5 waived investigations	10 minutes	.83 hours	\$77.44	\$64.28
245.117(a)-(c)— Vision acuity— Determination vision standards met—Medical examiner certificate/record	203 railroads	522 records	2 minutes	17.40 hours	\$71.89	\$1,250.89
—(d)(1) Request for retest and another medical evaluation— Medical examiner certificate/record	203 railroads	5 records	2 minutes	.17 hours	\$71.89	\$12.22
—(d)(2) Railroad to provide a copy of this part to medical examiner	203 railroads	522 copies	5 minutes	43.50 hours	\$71.89	\$3,127.22
—(d)(3) Consultations by medical examiners with railroad officer and issue of conditional certification	203 railroads	5 consultations + conditional certifications	30 minutes + 10 minutes	3.33 hours	\$71.89	\$239.39
—(g) Notification by certified dispatcher of deterioration of vision	203 railroads	1 notification	10 minutes	.17 hours	\$71.89	\$12.22

245.118—Hearing acuity— Determination hearing standards met—Medical records	203 railroads	522 medical records	2 minutes	17.40 hours	\$71.89	\$1,250.89
—(d)(1) Request for retest and another medical evaluation— Medical examiner certificate/record	203 railroads	5 records	2 minutes	.17 hours	\$71.89	\$12.22
—(d)(2) Railroad to provide a copy of this part to medical examiner	203 railroads	522 copies	5 minutes	43.50 hours	\$71.89	\$3,127.22
—(d)(3) Consultations by medical examiners with railroad officer and issue of conditional certification	203 railroads	5 consultations + conditional certifications	30 minutes + 10 minutes	3.33 hours	\$71.89	\$239.39
—(g) Notification by certified dispatcher of deterioration of hearing	203 railroads	1 notification	10 minutes	.17 hours	\$71.89	\$12.22
245.119(b)-(c)— Training requirements—A railroad's election for the training of dispatchers shall be stated in its certification program	The paperwork burden for this requirement is covered under § 245.101/.103.					
—(d) Initial training program for previously untrained person to be a dispatcher	203 railroads	71 training programs	3 hours	213.00 hours	\$115.24	\$24,546.12
—(d)(3) Modification to training program when new safety-related railroad laws, regulations and etc. are introduced into the workplace	The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.					
—(e) Relevant information or materials on safety or other rules made available to certification candidates	The paperwork burden for this requirement is covered under § 245.101/.103.					

—(f) and (g) Completion of initial training program by a person being certified as a dispatcher— Written documentation showing completed training program that complies with paragraph (d) of this section	203 railroads	67 written documents or records	10 minutes	11.17 hours	\$77.44	\$865.00
—(f)(3) Employee consultation with qualified supervisory employee if given written test to demonstrate knowledge of physical characteristics of any assigned territory	The paperwork burden for this requirement is covered under § 245.119.					
—(h) Certification program is submitted in accordance with the procedures and requirements described in § 245.107	The paperwork burden for this requirement is covered under § 245.101/.103.					
—(i) Familiarization training for dispatcher of acquiring railroad from selling company/railroad prior to commencement of new operation	FRA anticipates zero submissions.					
—(j) Continuing education of certified dispatchers	203 railroads	522 training records	15 minutes	130.50 hours	\$71.89	\$9,381.65
245.120— Requirements for territorial qualification — Determining eligibility and	The paperwork burden for this requirement is covered under § 245.119.					
—(b) Notification by persons who do not meet territorial qualification	The paperwork burden for this requirement is covered under § 245.119.					
245.121(a)-(c)— Knowledge testing—	203 railroads	522 test records	5 minutes	43.50 hours	\$77.44	\$3,368.64

Determining eligibility						
—(d) Reexamination of the failed test	203 railroads	2 examination records	5 minutes	.17 hours	\$77.44	\$13.16
245.123(c)—Monitoring operational performance—Unannounced compliance tests—Retention of a written record	203 railroads	1,822 records	2 minutes	60.73 hours	\$77.44	\$4,702.93
245.125—Certification determinations made by other railroads	203 railroads	3.33 determinations	30 minutes	1.67 hours	\$77.44	\$129.32
245.203(b)—Retaining information supporting determination—Records	203 railroads	522 record retentions	15 minutes	130.50 hours	\$77.44	\$10,105.92
—(g) Amended electronic records	203 railroads	1 amended record	15 minutes	.25 hours	\$77.44	\$19.36
245.205—List of certified dispatchers and recordkeeping.	The paperwork requirement for this burden is covered under § 245.105(c)(1)-(d)(1).					
245.207(a)-(f)—Certificate requirements	The paperwork requirement for this burden is covered under § 245.105(c)(2)-(d)(2).					
—(b) Notification by dispatchers that railroad request to serve exceeds certification	203 railroads	30 notifications	30 seconds	.25 hours	\$71.89	\$17.97
—(g)-(h) Replacement of certificates	203 railroads	15 replacement certificates	5 minutes	1.25 hour	\$77.44	\$96.80
245.213(a)-(h)—Multiple Certificates—Notification of denial of certification by individuals holding multiple certifications	203 railroads	3 notifications	10 minutes	.50 hour	\$77.44	\$38.72
—(i) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified in multiple crafts	The paperwork requirement for this burden is covered under § 245.105.					

245.215—Railroad oversight responsibility—Review and analysis of administration of certification program	203 railroads	17.33 annual reviews and analyses	8 hours	138.64 hours	\$115.24	\$15,976.87
—(d) Report of findings and conclusions reached during annual review by railroad to FRA (if requested in writing by FRA) review and analysis effort.	203 railroads	2 reports	4 hours	8.00 hours	\$115.24	\$921.92
245.301(a)—Denial of certification—Notification to candidate of information that and candidate response forms basis for denying certification	203 railroads	2 notices + 1 response	1 hour	3.00 hours	\$77.44	\$232.32
—(b) Denial Decision Requirements—Written notification of denial of certification by railroad to candidate	203 railroads	2 notifications	1 hour	2.00 hours	\$77.44	\$154.88
245.307(b)(1)-(b)(4)—Process for revoking certification—Immediate suspension of dispatcher's certification	203 railroads	5 suspended certification letters and documentations	30 minutes	2.50 hours	\$77.44	\$193.60
—(b)(5)-(b)(6) Determinations based on the record of the hearing, whether revocation of the certification is warranted	The paperwork requirement for this burden is covered under § 245.307(e).					
—(b)(7) Retention of record of the hearing for three years after the date the decision is rendered	203 railroads	5 records	15 minutes	1.25 hours	\$77.44	\$96.80
—(d)(9) Hearing Procedures—Written waiver of right to hearing	203 railroads	1 written waiver	10 minutes	.17 hours	\$59.00	\$10.03

—(e) Revocation Decision Requirements—Written decisions by railroad official	203 railroads	5 written decisions and service of decisions	2 hours	10.00 hours	\$115.24	\$1,152.40
—(g) Revocation of certification based on information that another railroad has done so	203 railroads	1 revoked certification	10 minutes	.17 hours	\$115.24	\$19.59
—(j) Placing relevant information in record if sufficient evidence meeting the criteria in paragraph (h) or (i) of this section becomes available	The paperwork requirement for this burden is covered under § 245.307(b)(7).					
—(k) Good faith determination	203 railroads	1 good faith determination	1 hour	1.00 hour	\$77.44	\$77.44
Subpart E—Dispute Resolution Procedures—§ 245.401 through § 245.411	The requirements under these provisions are exempted from the PRA under 5 CFR 1320.4(a)(2). Since these provisions pertain to an administrative action or investigation, there is no PRA burden associated with these requirements.					
Appendix A to Part 245 – Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data	The paperwork requirements described in this appendix are accounted for throughout this table.					
Appendix B to Part 245 – Medical Standards Guidelines	The paperwork requirements described in this appendix are accounted for throughout this table.					
Totals ³³	203 railroads + ASLRRRA and holding companies	9,493 responses	N/A	3,819 hours	N/A	\$403,937

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information.

Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: Whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of

³³ Totals may not add due to rounding.

FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Ms. Arlette Mussington, Information Collection Clearance Officer, at (571) 609-1285, or Ms. Joanne Swafford, Information Collection Clearance Officer, at (757) 897-9908.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them via email to Ms. Arlette Mussington at arlette.mussington@dot.gov, or Ms. Joanne Swafford at joanne.swafford@dot.gov.

OMB is required to decide concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Federalism Implications

Executive Order 13132, Federalism,³⁴ requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” are defined in the Executive Order to include regulations

³⁴ 64 FR 43255 (Aug. 10, 1999).

that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under 49 U.S.C. 20106. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply, and preparation of a federalism summary impact statement for the proposed rule is not required.

E. International Trade Impact Assessment

The Trade Agreements Act of 1979³⁵ prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. This proposed rule is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business

³⁵ 19 U.S.C. Ch. 13.

in the United States.

F. Environmental Impact

FRA has evaluated this proposed rule consistent with the National Environmental Policy Act³⁶ (NEPA), the Council on Environmental Quality's NEPA implementing regulations,³⁷ and FRA's NEPA implementing regulations³⁸ and determined that it is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS.³⁹ Specifically, FRA has determined that this proposed rule is categorically excluded from detailed environmental review.⁴⁰

The main purpose of this rulemaking is to establish certification requirements for train dispatchers. This rule would not directly or indirectly impact any environmental resources and would not result in significantly increased emissions of air or water pollutants or noise. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review.⁴¹ FRA has concluded that no such unusual circumstances exist with respect to this proposed rule and it meets the requirements for categorical exclusion.⁴²

³⁶ 42 U.S.C. 4321 *et seq.*

³⁷ 40 CFR parts 1500–1508.

³⁸ 23 CFR part 771.

³⁹ 40 CFR 1508.4.

⁴⁰ See 23 CFR 771.116(c)(15) (categorically excluding “[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise”).

⁴¹ 23 CFR 771.116(b).

⁴² 23 CFR 771.116(c)(15).

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties.⁴³ FRA has also determined that this rulemaking does not approve a project resulting in a use of a resource protected by Section 4(f).⁴⁴ Further, FRA reviewed this proposed rulemaking and found it consistent with Executive Order 14008, “Tackling the Climate Crisis at Home and Abroad.”

G. Executive Order 12898 (Environmental Justice)

Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” and DOT Order 5610.2C⁴⁵ require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate, and also requires consideration of the benefits of transportation programs, policies, and other activities where minority populations and low-income populations benefit, at a minimum, to the same level as the general population as a whole when determining impacts on minority and low-income populations. FRA has evaluated this proposed rule under Executive Order 12898 and the DOT Order and has determined it would not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

H. Unfunded Mandates Reform Act of 1995

⁴³ See 16 U.S.C. 470.

⁴⁴ See Department of Transportation Act of 1966, as amended (Pub. L. 89-670, 80 Stat. 931); 49 U.S.C. 303.

⁴⁵ Available at: <https://www.transportation.gov/sites/dot.gov/files/2021-08/Final-for-OST-C-210312-003-signed.pdf>.

Under section 201 of the Unfunded Mandates Reform Act of 1995,⁴⁶ each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the Act⁴⁷ further requires that “before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and Tribal governments and the private sector. This proposed rule would not result in the expenditure, in the aggregate, of \$100,000,000 or more (as adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

I. Energy Impact

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.”⁴⁸ FRA evaluated this proposed rule under Executive Order 13211 and determined that this regulatory action is not a “significant energy action” within the meaning of Executive Order 13211.

J. Privacy Act Statement

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to

⁴⁶ Pub. L. 104-4, 2 U.S.C. 1531.

⁴⁷ 2 U.S.C. 1532.

⁴⁸ 66 FR 28355 (May 22, 2001).

<http://www.regulations.gov>, as described in the system of records notice, DOT/ALL-14 FDMS, accessible through www.transportation.gov/privacy. To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

K. Executive Order 13175 (Tribal Consultation)

FRA has evaluated this proposed rule in accordance with the principles and criteria contained in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. The proposed rule would not have a substantial direct effect on one or more Indian Tribes, would not impose substantial direct compliance costs on Indian Tribal governments, and would not preempt Tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a Tribal summary impact statement is not required.

List of Subjects in 49 CFR Part 245

Administrative practice and procedure, Dispatcher, Penalties, Railroad employees, Railroad operating procedures, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend chapter II, subtitle B, of title 49 of the Code of Federal Regulations, by adding part 245 to read as follows:

PART 245—Qualification and Certification of Dispatchers

Sec.

Subpart A—General

- 245.1 Purpose and scope.
- 245.3 Application and responsibility for compliance.
- 245.5 Effect and construction.
- 245.7 Definitions.
- 245.9 Waivers.
- 245.11 Penalties and consequences for noncompliance.

Subpart B—Program and Eligibility Requirements

- 245.101 Certification program required.
- 245.103 FRA review of certification programs.
- 245.105 Implementation schedule for certification programs.
- 245.107 Requirements for certification programs.
- 245.109 Determinations required for certification and recertification.
- 245.111 Prior safety conduct as motor vehicle operator.
- 245.113 Prior safety conduct with other railroads.
- 245.115 Substance abuse disorders and alcohol drug rules compliance.
- 245.117 Vision acuity.
- 245.118 Hearing acuity.
- 245.119 Training requirements.
- 245.120 Requirements for territorial qualification.
- 245.121 Knowledge testing.
- 245.123 Monitoring operational performance.
- 245.125 Certification determinations made by other railroads.

Subpart C—Administration of the Certification Program

- 245.201 Time limitations for certification.
- 245.203 Retaining information supporting determinations.
- 245.205 List of certified dispatchers and recordkeeping.
- 245.207 Certificate requirements.
- 245.213 Multiple certifications.
- 245.215 Railroad oversight responsibilities.

Subpart D—Denial and Revocation of Certification

- 245.301 Process for denying certification.
- 245.303 Criteria for revoking certification.
- 245.305 Periods of ineligibility.
- 245.307 Process for revoking certification.

Subpart E—Dispute Resolution Procedures

- 245.401 Review board established.
- 245.403 Petition requirements.
- 245.405 Processing certification review petitions.
- 245.407 Request for a hearing.
- 245.409 Hearings.
- 245.411 Appeals.

Appendix B to Part 245—Medical Standards Guidelines

Authority: 49 U.S.C. 20103, 20107, 20162, 21301, 21304, 21311; 28 U.S.C. 2461 note; 49 CFR 1.89; and Public Law 110-432, sec. 402, 122 Stat. 4884.

Subpart A—General

§ 245.1 Purpose and scope.

(a) The purpose of this part is to ensure that only those persons who meet minimum Federal safety standards serve as dispatchers, to reduce the rate and number of accidents and incidents, and to improve railroad safety.

(b) This part prescribes minimum Federal safety standards for the eligibility, training, testing, certification, and monitoring of all dispatchers to whom it applies. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements consistent with this part.

(c) The dispatcher certification requirements prescribed in this part apply to any person who meets the definition of dispatcher contained in § 245.7, regardless of the fact that the person may have a job classification title other than that of dispatcher.

§ 245.3 Application and responsibility for compliance.

(a) This part applies to all railroads except:

(1) Railroads that do not have any dispatch tasks, as defined in § 245.7, performed either by dispatchers employed by the railroad or employed by a contractor or subcontractor;

(2) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.*, plant railroads, as defined in § 245.7);

(3) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation as defined in § 245.7; or

(4) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(b) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, as defined in § 245.7, who performs any function required by this part must perform that function in accordance with this part.

§ 245.5 Effect and construction.

(a) FRA does not intend, by use of the term dispatcher in this part, to alter the terms, conditions, or interpretation of existing collective bargaining agreements that employ other job classification titles when identifying a person who dispatches train.

(b) FRA does not intend, by issuance of these regulations, to alter the authority of a railroad to initiate disciplinary sanctions against its employees, including managers and supervisors, in the normal and customary manner, including those contained in its collective bargaining agreements.

(c) Except as provided in § 245.213, nothing in this part shall be construed to create or prohibit an eligibility or entitlement to employment in other service for the railroad as a result of denial, suspension, or revocation of certification under this part.

(d) Nothing in this part shall be deemed to abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to removal from service or other adverse action taken as a consequence of this part.

§ 245.7 Definitions.

As used in this part:

Administrator means the Administrator of the FRA or the Administrator's delegate.

Alcohol means ethyl alcohol (ethanol) and includes use or possession of any beverage, mixture, or preparation containing ethyl alcohol.

Blocking device means a method of control that either prohibits the operation of a switch or signal or restricts access to a section of track.

Controlled substance has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR parts 1301 through 1316).

Controlled track means a track upon which movements of trains, engines, and on-track equipment must be authorized by a control station.

Dispatch means:

(1) To perform a function that would be classified as a duty of a “dispatching service employee,” as that term is defined by the hours of service laws at 49 U.S.C. 21101(2), if the function were to be performed in the United States. The term dispatch includes, but is not limited to, by the use of an electrical or mechanical device:

(i) Controlling the movement of a train or other on-track equipment by the issuance of a written or verbal authority or permission affecting a railroad operation, or by establishing a route through the use of a railroad signal or train control system but not merely by aligning or realigning a switch; or

(ii) Controlling the occupancy of a track by a roadway worker or stationary on-track equipment, or both; or

(iii) Issuing an authority for working limits to a roadway worker.

(2) The term *dispatch* does not include the action of personnel in the field:

(i) Effecting implementation of a written or verbal authority or permission affecting a railroad operation or an authority or permission affecting a railroad operation or an authority for working limits to a roadway worker (*e.g.*, initiating an interlocking timing device, authorizing a train to enter working limits); or

(ii) Operating a function of a signal system designed for use by those personnel;

or

(iii) Sorting and grouping rail cars inside a railroad yard to assemble or disassemble a train.

Dispatcher means any individual who dispatches.

Dispatcher Pilot means a dispatcher qualified on assigned territory, tasked with overseeing a non-qualified employee who has not successfully completed all instruction, training and examination programs for the physical characteristics of the territory or position.

Drug means any substance (other than alcohol) that has known mind or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

Drug and alcohol counselor (DAC) means a person who meets the credentialing and qualification requirements of a “Substance Abuse Professional” (SAP), as provided in 49 CFR part 40.

File, filed, and filing mean submission of a document under this part on the date when the Docket Clerk receives it, or if sent by mail, the date mailing was completed.

FRA means the Federal Railroad Administration.

FRA representative means the FRA Associate Administrator for Railroad Safety/Chief Safety Officer and the Associate Administrator's delegate, including any safety inspector employed by the Federal Railroad Administration and any qualified State railroad safety inspector acting under part 212 of this chapter.

Ineligible or ineligibility means that a person is legally disqualified from serving as a certified dispatcher. The term covers a number of circumstances in which a person may not serve as a certified dispatcher. Revocation of certification pursuant to § 245.307 and denial of certification pursuant to § 245.301 are two examples in which a person would be ineligible to serve as a dispatcher. A period of ineligibility may end when a

condition or conditions are met, such as when a person meets the conditions to serve as a dispatcher following an alcohol or drug violation pursuant to § 245.115.

Knowingly means having actual knowledge of the facts giving rise to the violation or that a reasonable person acting in the circumstances, exercising due care, would have had such knowledge.

Main track means a track upon which the operation of trains is governed by one or more of the following methods of operation: Timetable; mandatory directive; signal indication; or any form of absolute or manual block system.

Mandatory directive means any movement authority or speed restriction that affects a railroad operation.

Medical examiner means a person licensed as a doctor of medicine or doctor of osteopathy. A medical examiner can be a qualified full-time salaried employee of a railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified practitioner designated by the railroad to perform functions in connection with medical evaluations of employees. As used in this rule, the medical examiner owes a duty to make an honest and fully informed evaluation of the condition of an employee.

On-the-job training means job training that occurs in the workplace, *i.e.*, the employee learns the job while doing the job.

Person means an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

Physical characteristics means the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train.

Physical characteristics includes *main track physical characteristics* (see definition of “main track” in this section) and other than main track physical characteristics.

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

Qualified means a person who has successfully completed all instruction, training and examination programs required by the employer, and the applicable parts of this chapter and that the person therefore may reasonably be expected to be proficient on all safety related tasks the person is assigned to perform.

Qualified instructor means a person who has demonstrated, pursuant to the railroad's written program, an adequate knowledge of the subjects under instruction and, where applicable, has the necessary dispatching experience to effectively instruct in the field, and has the following qualifications:

- (1) Has demonstrated, pursuant to the railroad’s written program, an adequate knowledge of the subjects under instruction;
- (2) Where applicable, has the necessary experience to effectively instruct in the field;
- (3) Is a certified dispatcher under this part; and

(4) If the railroad has designated employee representation, has been selected by a designated railroad officer, in concurrence with the designated employee representative, or has a minimum of one year of service working as a certified dispatcher.

Railroad means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways and any entity providing such transportation, including:

(1) Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Railroad officer means any supervisory employee of a railroad.

Roadway worker in charge (RWIC) means a roadway worker who is qualified under § 214.353 of this chapter to establish on-track safety for roadway work groups, and lone workers qualified under § 214.347 of this chapter to establish on-track safety for themselves.

Serve or service, in the context of serving documents, has the meaning given in Rule 5 of the Federal Rules of Civil Procedure as amended. Similarly, the computation of time provisions in Rule 6 of the Federal Rules of Civil Procedure as amended are also applicable in this part. *See also* the definition of “filing” in this section.

Substance abuse disorder refers to a psychological or physical dependence on alcohol or a drug, or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is “active” within the meaning of this part if the person is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions

described in § 219.103 of this chapter or has failed to complete primary treatment successfully or participate in aftercare successfully as directed by a DAC or SAP.

Substance Abuse Professional (SAP) means a person who meets the qualifications of a substance abuse professional, as provided in 49 CFR part 40.

Territorial qualifications means possessing the necessary knowledge concerning a railroad's operating rules and timetable special instructions including familiarity with applicable *main track and other than main track physical characteristics* of the territory over which the locomotive or train movement will occur as well as the characteristics of the position to include and not limited to the operation and capabilities of dispatch control systems.

Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (*i.e.*, there is no freight, intercity passenger, or commuter passenger railroad operation on the track).

§ 245.9 Waivers.

(a) A person subject to a requirement of this part may petition FRA for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for a waiver under this section must be filed in the manner and contain the information required by part 211 of this chapter.

(c) If FRA finds that a waiver of compliance is in the public interest and is consistent with railroad safety, FRA may grant the waiver subject to any conditions FRA deems necessary.

§ 245.11 Penalties and consequences for noncompliance.

(a) Any person (including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any employee of such owner, manufacturer, lessor, or lessee; or any independent contractor or subcontractor of a railroad) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least the minimum civil monetary penalty and not more than the ordinary maximum civil monetary penalty per violation. However, penalties may be assessed against individuals only for willful violations, and a penalty not to exceed the aggravated maximum civil monetary penalty per violation may be assessed, where:

(1) A grossly negligent violation, or a pattern of repeated violations, has created an imminent hazard of death or injury to persons; or

(2) A death or injury has occurred. See 49 CFR part 209, appendix A.

(b) Each day a violation continues constitutes a separate offense.

(c) A person who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from all safety-sensitive service in accordance with part 209 of this chapter.

(d) A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

(e) In addition to the enforcement methods referred to in paragraphs (a) through (d) of this section, FRA may also address violations of this part by use of the emergency order, compliance order, and/or injunctive provisions of the Federal rail safety laws.

(f) FRA's website at <https://railroads.dot.gov/> contains a schedule of civil penalty amounts used in connection with this part.

Subpart B—Program and Eligibility Requirements

§ 245.101 Certification program required.

(a) Each railroad that this part applies to shall have a written dispatcher certification program.

(b) Each certification program shall include all of the following:

(1) A procedure for evaluating prior safety conduct as a motor vehicle operator that complies with the criteria established in § 245.111.

(2) A procedure for evaluating prior safety conduct as an employee or certified dispatcher of a different railroad that complies with the criteria established in § 245.113.

(3) A procedure for evaluating potential substance abuse disorders and compliance with railroad alcohol and drug rules that complies with the criteria established in § 245.115.

(4) A procedure for evaluating vision and hearing acuity that complies with the criteria established in §§ 245.117 and 245.118.

(5) A procedure for training that complies with the criteria established in § 245.119.

(6) A procedure for knowledge testing that complies with the criteria established in § 245.121.

(7) A procedure for monitoring operational performance that complies with the criteria established in § 245.123.

§ 245.103 FRA review of certification programs.

(a) *Certification program submission schedule for railroads with current dispatching operations.* Each railroad with current dispatching operations, as [EFFECTIVE DATE OF FINAL RULE] shall submit its dispatcher certification program to FRA, in accordance with the procedures and requirements contained in § 245.107, according to the following schedule:

(1) All Class I railroads (including the National Railroad Passenger Corporation) and railroads providing commuter service shall submit their programs to FRA no later

than [DATE EIGHT MONTHS AFTER THE EFFECTIVE DATE OF THE FINAL RULE].

(2) All Class II railroads and Class III railroads (including a switching and terminal or other railroad not otherwise classified) shall submit their programs to FRA no later than [DATE 16 MONTHS AFTER THE EFFECTIVE DATE OF THE FINAL RULE].

(b) *Certification program submission for new dispatching railroads.* For each railroad that commences dispatching operations after the effective date of this rule, the railroad shall submit and obtain approval of its written certification program to FRA, in accordance with the procedures and requirements contained in § 245.107, prior to commencing dispatching operations.

(c) *Method for submitting certification programs to FRA.* Railroads must submit their written certification programs and their requests for approval (described in § 245.107(a)) by uploading the program to FRA's secure document submission site.

(d) *Notification requirements.* Each railroad that submits a program to FRA must:

(1) Simultaneously with its submission, provide a copy of the program and the request for approval to the president of each labor organization that represents the railroad's dispatchers and to all of the railroad's dispatchers that are subject to this part; and

(2) Include in its submission to FRA, a statement affirming that the railroad has provided a copy of the program and the request for approval to the president of each labor organization that represents the railroad's dispatchers and to all of the railroad's dispatchers that are subject to this part, along with a list of the names and email addresses of each president of a labor organization who was provided a copy of the program.

(e) *Comment period.* Any designated representative of dispatchers subject to this part or any directly affected person who does not have a designated representative may comment on a railroad's program provided that:

(1) The comment is submitted no later than 45 days after the date the program was submitted to FRA;

(2) The comment includes a concise statement of the commenter's interest in the matter;

(3) The commenter affirms that a copy of the comment was provided to the railroad; and

(4) The comment was emailed to FRADISPATCHCERTPROG@dot.gov.

(f) *FRA review period.* Upon receipt of a program, FRA will commence a thorough review of the program to ensure that it satisfies all of the requirements under this part.

(1) If FRA determines that the program satisfies all of the requirements under this part, FRA will issue a letter notifying the railroad that its program has been approved. Such letter will typically be issued within 90 days of the date the program was submitted to FRA.

(2) If FRA determines that the program does not satisfy all of the requirements under this part, FRA will issue a letter notifying the railroad that its program has been disapproved. Such letter will typically be issued within 90 days of the date the program was submitted to FRA and will identify the deficiencies found in the program that must be corrected before the program can be approved. After addressing these deficiencies, railroads can resubmit their programs in accordance with paragraph (h) of this section.

(3) If a railroad does not receive an approval or disapproval letter from FRA within 90 days of the date the program was submitted to FRA, FRA's decision on the program will remain pending until such time that FRA issues a letter either approving or

disapproving the program. A certification program is not approved until FRA issues a letter approving the program.

(g) *Material modifications.* A railroad that intends to make one or more material modifications to its FRA-approved program must submit a description of how it intends to modify the program and a copy of the modified program.

(1) A modification is material if it would affect the program's conformance with this part.

(2) The description of the modification and the modified program must conform with the procedures and requirements contained in § 245.107.

(3) The process for submission and review of material modifications shall conform with paragraphs (c) through (f) of this section.

(4) A railroad cannot implement a material modification to its program until FRA issues its approval of the material modification in accordance with paragraph (f)(1) of this section.

(h) *Resubmissions.* If FRA disapproves a railroad's program or material modification, as described in paragraph (f)(2) of this section, the railroad can resubmit its program or material modification after addressing all of the deficiencies noted by FRA.

(1) The resubmission must conform with the procedures and requirements contained in § 245.107.

(2) The process for submission and review of resubmitted programs and resubmitted material modifications shall conform with paragraphs (c) through (f) of this section.

(3) The following deadlines apply for railroads that have their programs or material modifications disapproved by FRA:

(i) For a railroad that submitted its program pursuant to paragraph (a) of this section, the railroad must resubmit its program within 30 days of the date that FRA

notified the railroad of the deficiencies in its program. If a railroad fails to resubmit its program within this timeframe and it continues its dispatching operations, FRA may consider such actions to be a failure to implement a program.

(ii) For a railroad that submitted its program pursuant to paragraph (b) of this section, there is no FRA-imposed deadline for resubmitting its program. However, pursuant to § 245.105(b), the railroad cannot begin dispatching operations until its program has been approved by FRA.

(iii) For a railroad that submitted a material modification to its FRA-approved program, there is no FRA-imposed deadline for resubmitting the material modification. However, pursuant to paragraph (g)(3) of this section, the railroad cannot implement the material modification until it has been approved by FRA.

(i) *Rescinding prior approval of program.* FRA reserves the right to revisit its prior approval of a railroad's program at any time.

(1) If upon such review, FRA discovers deficiencies in the program such that the program does not comply with subpart B of this part, FRA shall issue the railroad a letter rescinding its prior approval of the program and notifying the railroad of the deficiencies in its program that must be addressed.

(2) Within 30 days of FRA notifying the railroad of the deficiencies in its program, the railroad must address these deficiencies and resubmit its program to FRA. The resubmitted program must conform with the procedures and requirements contained in § 245.107.

(3) The process for submission and review of resubmitted programs under this paragraph shall conform with paragraphs (c) through (f) of this section.

(4) If a railroad fails to resubmit its program to FRA within the timeframe prescribed in paragraph (i)(2) of this section and the railroad continues its dispatching operations, FRA may consider such actions to be a failure to implement a program.

(5) If FRA issues a letter disapproving the railroad's resubmitted program, the railroad shall continue to resubmit its program in accordance with this paragraph (i).

(6) A program that has its approval rescinded under paragraph (i)(1) of this section may remain in effect until whichever of the following happens first:

(i) FRA approves the railroad's resubmitted program; or

(ii) FRA disapproves the railroad's second attempt at resubmitting its program.

(7) If FRA disapproves a railroad's second attempt at resubmitting its program under this paragraph and the railroad continues its dispatching operations, FRA may consider such actions to be a failure to implement a program.

(j) *Availability of certification program documents.* The following documents will be available on FRA's website (railroads.dot.gov):

(1) A railroad's originally submitted program, a resubmission of its program, or a material modification of its program;

(2) Any comments, submitted in accordance with paragraph (e) of this section, to a railroad's originally submitted program, a resubmission of its program, or a material modification of its program; and

(3) Any approval or disapproval letter issued by FRA in response to a railroad's originally submitted program, a resubmission of its program, or a material modification of its program.

§ 245.105 Implementation schedule for certification programs.

(a) Each railroad that submits its dispatcher certification program to FRA in accordance with § 245.103(a), may continue dispatching operations while it awaits approval of its program by FRA. However, if FRA disapproves a railroad's program on two occasions and the railroad continues dispatching operations, FRA may consider such actions to be a failure to implement a program.

(b) Each railroad that submits its dispatcher certification program to FRA in accordance with § 245.103(b), must have its program approved by FRA prior to commencing dispatching operations. If such railroad commences dispatching operations before its program is approved by FRA, FRA may consider such actions to be a failure to implement a program.

(c) By [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], each railroad shall:

(1) In writing, designate as certified dispatchers all persons authorized by the railroad to perform the duties of a dispatcher as of [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE]; and

(2) Issue a certificate that complies with § 245.207 to each person that it designates.

(d) After [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], each railroad shall:

(1) In writing, designate as a certified dispatcher any person who has been authorized by the railroad to perform the duties of a dispatcher between [EFFECTIVE DATE OF FINAL RULE] and the date FRA approves the railroad's certification program; and

(2) Issue a certificate that complies with § 245.207 to each person that it designates.

(e) After [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], no railroad shall permit or require a person to perform service as a dispatcher unless that person is a certified dispatcher.

(f) No railroad shall permit or require a person, designated as a certified dispatcher under the provisions of paragraph (c) or (d) of this section, to perform service as a certified dispatcher for more than three years after the date FRA approves the

railroad's certification program unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part.

(1) Except as provided in paragraph (f)(3) of this section, a person who has been designated as a certified dispatcher under the provisions of paragraph (c) or (d) of this section and who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or in accordance with the terms of the Railroad Retirement Act (45 U.S.C. 231) within three years from the date the certifying railroad's program is approved by FRA, may request in writing, that a railroad not recertify that person, pursuant to subpart B of this part, until three years from the date the certifying railroad's program is approved.

(2) Upon receipt of a written request pursuant to paragraph (f)(1) of this section, a railroad may wait to recertify the person making the request until the end of the three-year period after FRA has approved the railroad's certification program. If a railroad grants any request, it must grant the request of all eligible persons to every extent possible.

(3) A person who is subject to recertification under part 240 or 242 of this chapter may not make a request pursuant to paragraph (f)(1) of this section.

(g) After a railroad's certification program has been approved by FRA, the railroad shall only certify or recertify a person as a dispatcher if that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part.

§ 245.107 Requirements for certification programs.

(a) *Railroad's certification program submission.* (1) A railroad's certification program submission must include a copy of the certification program and a request for approval.

(2) The request for approval can be in letter or narrative format.

(3) A railroad will receive approval or disapproval notices from FRA by email.

(4) FRA may electronically store any materials required by this part.

(b) *Organization of the certification program.* Each program must be organized to present the required information in paragraphs (b)(1) through (6) of this section. Each section must begin by giving the name, title, telephone number, and email address of the person to be contacted concerning the matters addressed by that section. If a person is identified in a prior section, it is sufficient to merely repeat the person's name in a subsequent section.

(1) *Section 1 of the program: general information and elections.* (i) The first section of the submission must contain the name of the railroad, the person to be contacted concerning the request (including the person's name, title, telephone number, and email address) and a statement electing either to accept responsibility for educating previously uncertified persons to be dispatchers or to not accept this responsibility.

(ii) If a railroad elects not to provide initial dispatcher training, the railroad will be limited to recertifying persons initially certified by another railroad. A railroad can change its election by obtaining FRA approval of a material modification to its program in accordance with § 245.103(g).

(iii) If a railroad elects to accept responsibility for training persons not previously certified as dispatchers, the railroad must submit information on how such persons will be trained, but is not required to actually perform such training. A railroad that elects to accept the responsibility for the training of such persons may authorize another railroad or a non-railroad entity to perform the actual training effort. The electing railroad remains responsible for ensuring that such other training providers adhere to the training program the railroad submits.

(2) *Section 2 of the program: training persons previously certified.* The second section of the submission must contain information concerning the railroad's program for training previously certified dispatchers, including all of the following information:

(i) As provided for in § 245.119(j), each railroad must have a program for the ongoing education of its dispatchers to ensure that they maintain the necessary knowledge concerning relevant Federal safety regulations, operating rules and practices, familiarity with physical characteristics of the territory, and the dispatching systems and technology. The railroad must describe in this section how it will ensure that its dispatchers remain knowledgeable concerning the safe discharge of their responsibilities so as to comply with the standard set forth in § 245.119(j);

(ii) In accordance with the requirements in § 245.119(h), this section must contain sufficient detail to permit effective evaluation of the railroad's training program in terms of the subject matters covered, the frequency and duration of the training sessions (including the interval between attendance at such trainings), the training environment employed (for example, use of classroom, use of computer-based training, use of film or slide presentations, and use of on-the-job training), and which aspects of the program are voluntary or mandatory;

(iii) How the training will address a certified dispatcher's loss of retention of knowledge over time;

(iv) How the training will address changed circumstances over time such as the introduction of new or modified technology, including software modifications to dispatch systems and related signal and train control systems, new operating rule books, or significant changes in operations including alteration in the territory dispatchers are authorized to work over; and

(v) A plan for familiarization training that addresses how long a person can be absent from dispatching on a territory before needing to be requalified on that territory (a

time period that cannot exceed 12 months), and once that threshold is reached, how the person will acquire the needed familiarization training.

(3) *Section 3 of the program: testing and evaluating persons previously certified.*

The third section of the submission must contain information concerning the railroad's program for testing and evaluating previously certified dispatchers including all of the following information:

(i) The railroad must describe in this section how it will ensure that its dispatchers demonstrate their knowledge concerning the safe discharge of their responsibilities so as to comply with the standards set forth in § 245.121; and

(ii) The railroad must describe in this section how it will have ongoing testing and evaluation to ensure that its dispatchers have the necessary vision and hearing acuity as provided for in §§ 245.117 and 245.118. This section must also address how a railroad will ensure that its medical examiners have sufficient information concerning the railroad's operations, as well as the dispatcher's safety related tasks, to effectively form appropriate conclusions about the ability of a particular individual to safely perform as a dispatcher.

(4) *Section 4 of the program: training, testing, and evaluating persons not previously certified.* Unless a railroad has made an election not to accept responsibility for conducting the initial training of persons to be dispatchers, the fourth section of the submission must contain information concerning the railroad's program for educating, testing, and evaluating persons not previously certified as dispatchers including all of the following information:

(i) As provided for in § 245.119(d), a railroad that is issuing an initial dispatcher certification to a person must have a program for the training, testing, and evaluation of its dispatchers to ensure that they acquire the necessary knowledge and skills. A railroad must describe in this section how it will ensure that its dispatchers will acquire sufficient

knowledge and skills and demonstrate their knowledge and skills concerning the safe discharge of their responsibilities.

(ii) This section must contain the same level of detail concerning initial training programs and the testing and evaluation of previously uncertified dispatchers as is required for previously certified dispatchers in § 245.107(b)(2) and (3) (Sections 2 and 3 of the program).

(iii) Railroads that elect to rely on other entities to conduct training away from the railroad's own territory and dispatching systems and technology, must indicate how the student will be provided with the required training on the physical characteristics for the railroad's territory and dispatching systems and technology.

(5) *Section 5 of the program: monitoring operational performance by certified dispatchers.* The fifth section of the submission must contain information concerning the railroad's program for monitoring the operation of its certified dispatchers including all of the following information:

(i) Section 245.123 requires that a railroad perform ongoing monitoring of its dispatchers and that each dispatcher has an annual unannounced compliance test. A railroad must describe in this section how it will ensure that the railroad is monitoring that its dispatchers demonstrate their skills concerning the safe discharge of their responsibilities.

(ii) A railroad must describe the scoring system used by the railroad during an operational monitoring observation or unannounced compliance test administered in accordance with the procedures required under § 245.123.

(6) *Section 6 of the program: procedures for routine administration of the dispatcher certification program.* The final section of the submission must contain a summary of how the railroad's program and procedures will implement the various aspects of the regulatory provisions that relate to routine administration of its certification

program for dispatchers. Specifically, this section must address the procedural aspects of the following provisions and must describe the manner in which the railroad will implement its program so as to comply with each of the following provisions:

(i) Section 245.301 which provides that each railroad must have procedures for review and comment on adverse information;

(ii) Sections 245.111, 245.113, 245.115, and 245.303 which require a railroad to have procedures for evaluating data concerning prior safety conduct as a motor vehicle operator and as railroad workers;

(iii) Sections 245.109, 245.201, and 245.301 which place a duty on the railroad to make a series of determinations. When describing how it will implement its program to comply with those sections, a railroad must describe: the procedures it will utilize to ensure that all of the necessary determinations have been made in a timely fashion; who will be authorized to conclude that a person will or will be not certified; and how the railroad will communicate adverse decisions;

(iv) Sections 245.109, 245.117, 245.118, 245.119, and 245.121, which place a duty on the railroad to make a series of determinations. When describing how it will implement its program to comply with those sections, a railroad must describe how it will document the factual basis the railroad relied on in making determinations under those sections;

(v) Section 245.125 which permits reliance on certification determinations made by other railroads; and

(vi) Sections 245.207 and 245.307 which contain the requirements for replacing lost certificates and the conduct of certification revocation proceedings.

§ 245.109 Determinations required for certification and recertification.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad, prior to initially certifying or recertifying any person as a dispatcher, shall, in accordance with its FRA-approved program, determine in writing that:

(1) The individual meets the prior safety conduct eligibility requirements of §§ 245.111 and 245.113;

(2) The individual meets the eligibility requirements of §§ 245.115 and 245.303;

(3) The individual meets the vision and hearing acuity standards of §§ 245.117 and 245.118;

(4) The individual has the necessary knowledge, as demonstrated by successfully completing a test that meets the requirements of § 245.121; and

(5) If applicable, the individual has completed a training program that meets the requirements of § 245.119.

(b) Nothing in this section, § 245.111, or § 245.113 shall be construed to prevent persons subject to this part from entering into an agreement that results in a railroad obtaining the information needed for compliance with this subpart in a different manner than that prescribed in § 245.111 or § 245.113.

§ 245.111 Prior safety conduct as motor vehicle operator.

(a) Except as provided in paragraphs (b) through (e) of this section, after FRA has approved a railroad's dispatcher certification program, the railroad, prior to initially certifying or recertifying any person as a dispatcher, shall determine that the person meets the eligibility requirements of this section involving prior conduct as a motor vehicle operator.

(b) A railroad shall initially certify a person as a dispatcher for 60 days if the person:

(1) Requested the information required by paragraph (g) of this section at least 60 days prior to the date of the decision to certify that person; and

(2) Otherwise meets the eligibility requirements provided in § 245.109(a)(1) through (5).

(c) A railroad shall recertify a person as a dispatcher for 60 days from the expiration date of that person's certification if the person:

(1) Requested the information required by paragraph (g) of this section at least 60 days prior to the date of the decision to recertify that person; and

(2) Otherwise meets the eligibility requirements provided in § 245.109(a)(1) through (5).

(d) Except as provided in paragraph (e) of this section, if a railroad who certified or recertified a person for 60 days pursuant to paragraph (b) or (c) of this section does not obtain and evaluate the information requested pursuant to paragraph (g) of this section within 60 days, that person will be ineligible to perform as a dispatcher until the information can be evaluated by the railroad.

(e) If a person requests the information required pursuant to paragraph (g) of this section but is unable to obtain it, that person or the railroad certifying or recertifying that person may petition for a waiver of the requirements of paragraph (a) of this section in accordance with the provisions of part 211 of this chapter. A railroad shall certify or recertify a person during the pendency of the waiver request if the person otherwise meets the eligibility requirements provided in § 245.109(a)(1) through (5).

(f) Except for persons designated as dispatchers under §245.105(c) or (d) or for persons covered by paragraph (j) of this section, each person seeking certification or recertification under this part shall, within one year prior to the date of the railroad's decision on certification or recertification:

(1) Take the actions required by paragraphs (g) through (i) of this section to make information concerning their driving record available to the railroad that is considering such certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State, Federal, or foreign law to make information concerning their driving record available to that railroad.

(g) Each person seeking certification or recertification under this part shall request, in writing, that the chief of each driver licensing agency identified in paragraph (h) of this section provide a copy of that agency's available information concerning their driving record to the railroad that is considering such certification or recertification.

(h) Each person shall request the information required under paragraph (g) of this section from:

(1) The chief of the driver licensing agency of any jurisdiction, including a State or foreign country, which last issued that person a driver's license; and

(2) The chief of the driver licensing agency of any other jurisdiction, including states or foreign countries, that issued or reissued the person a driver's license within the preceding five years.

(i) If advised by the railroad that a driver licensing agency has informed the railroad that additional information concerning that person's driving history may exist in the files of a State agency or foreign country not previously contacted in accordance with this section, such person shall:

(1) Request in writing that the chief of the driver licensing agency which compiled the information provide a copy of the available information to the prospective certifying railroad; and

(2) Take any additional action required by State, Federal, or foreign law to obtain that additional information.

(j) Any person who has never obtained a motor vehicle driving license is not required to comply with the provisions of paragraph (g) of this section but shall notify the

railroad of that fact in accordance with procedures established by the railroad in its certification program.

(k) Each certified dispatcher or person seeking initial certification shall report motor vehicle incidents described in paragraphs (m)(1) and (2) of this section to the employing railroad within 48 hours of being convicted for, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for, such violations. For purposes of this paragraph and paragraph (m) of this section, "State action" means action of the jurisdiction that has issued the motor vehicle driver's license, including a foreign country. For purposes of dispatcher certification, no railroad shall require reporting earlier than 48 hours after the conviction, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license.

(l) When evaluating a person's motor vehicle driving record, a railroad shall not consider information concerning motor vehicle driving incidents that occurred:

(1) Prior to the effective date of this rule;

(2) More than three years before the date of the railroad's certification decision;

or

(3) At a time other than that specifically provided for in § 245.111, § 245.113, § 245.115, or § 245.303.

(m) A railroad shall only consider information concerning the following types of motor vehicle incidents:

(1) A conviction for, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance; or

(2) A conviction for, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for refusal to undergo such testing as is required by

State or foreign law when a law enforcement official seeks to determine whether a person is operating a vehicle while under the influence of alcohol or a controlled substance.

(n) If such an incident, described in paragraph (m) of this section, is identified:

(1) The railroad shall provide the data to the railroad's DAC, together with any information concerning the person's railroad service record, and shall refer the person for evaluation to determine if the person has an active substance abuse disorder.

(2) The person shall cooperate in the evaluation and shall provide any requested records of prior counseling or treatment for review exclusively by the DAC in the context of such evaluation.

(3) If the person is evaluated as not currently affected by an active substance abuse disorder, the subject data shall not be considered further with respect to certification. However, the railroad shall, on recommendation of the DAC, condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs deemed necessary by the DAC consistent with the technical standards specified in 49 CFR part 219, subpart H, as well as 49 CFR part 40.

(4) If the person is evaluated as currently affected by an active substance abuse disorder, the provisions of § 245.115(c) will apply.

(5) If the person fails to comply with the requirements of paragraph (n)(2) of this section, the person shall be ineligible to perform as a certified dispatcher until such time as the person complies with the requirements.

(o) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.113 Prior safety conduct with other railroads.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate, that the certification candidate meets the eligibility requirements of this section.

(b) If the certification candidate has not been employed or certified by any other railroad in the previous five years, they do not have to submit a request in accordance with paragraph (c) of this section, but they must notify the railroad of this fact in accordance with procedures established by the railroad in its certification program.

(c) Except as provided for in paragraph (b) of this section, each person seeking certification or recertification under this part shall submit a written request to each railroad that employed or certified the person within the previous five years to provide the following information to the railroad that is considering whether to certify or recertify that person as a dispatcher:

(1) Information about that person's compliance with § 245.111 within the three years preceding the date of the request;

(2) Information about that person's compliance with § 245.115 within the five years preceding the date of the request; and

(3) Information about that person's compliance with § 245.303 within the five years preceding the date of the request.

(d) Each person submitting a written request required by paragraph (c) of this section shall:

(1) Submit the request no more than one year before the date of the railroad's decision on certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State or Federal law to make information concerning their service record available to that railroad.

(e) Within 30 days after receipt of a written request that complies with paragraph (c) of this section, a railroad shall provide the information requested to the railroad designated in the written request.

(f) If a railroad is unable to provide the information requested within 30 days after receipt of a written request that complies with paragraph (c) of this section, the railroad shall provide an explanation, in writing, of why it cannot provide the information within the requested time frame. If the railroad will ultimately be able to provide the requested information, the explanation shall state approximately how much more time the railroad needs to supply the requested information. If the railroad will not be able to provide the requested information, the explanation shall provide an adequate explanation for why it cannot provide this information. Copies of this explanation shall be provided to the railroad designated in the written request and to the person who submitted the written request for information.

(g) When evaluating a person's prior safety conduct with a different railroad, a railroad shall not consider information concerning prior safety conduct that occurred:

(1) Prior to [EFFECTIVE DATE OF FINAL RULE]; or

(2) At a time other than that specifically provided for in § 245.111, § 245.113, § 245.115, or § 245.303.

(h) Each railroad shall adopt and comply with a program that complies with the requirements of this section. When any person (including but not limited to a railroad; any manager, supervisor, official, or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any employee of such owner, manufacturer, lessor, lessee, or independent contractor or subcontractor) violates any requirement of a program that complies with the requirements of this subject, that person shall be considered to have violated the requirements of this section.

§ 245.115 Substance abuse disorders and alcohol drug rules compliance.

(a) *Eligibility determination.* After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate, that the person meets the eligibility requirements of this section.

(b) *Documentation.* In order to make the determination required under paragraph (c) of this section, a railroad shall have on file documents pertinent to that determination, including a written document from its DAC which states their professional opinion that the person has been evaluated as not currently affected by a substance abuse disorder or that the person has been evaluated as affected by an active substance abuse disorder.

(c) *Fitness requirement.* (1) A person who has an active substance abuse disorder shall be denied certification or recertification as a dispatcher.

(2) Except as provided for in paragraph (f) of this section, a certified dispatcher who is determined to have an active substance abuse disorder shall be ineligible to hold certification. Consistent with other provisions of this part, certification may be reinstated as provided in paragraph (e) of this section.

(3) In the case of a current employee of a railroad evaluated as having an active substance abuse disorder (including a person identified under the procedures of § 245.111), the employee may, if otherwise eligible, voluntarily self-refer for substance abuse counseling or treatment under the policy required by § 219.1001(b)(1) of this chapter; and the railroad shall then treat the substance abuse evaluation as confidential except with respect to ineligibility for certification.

(d) *Prior alcohol/drug conduct; Federal rule compliance.* (1) In determining whether a person may be or remain certified as a dispatcher, a railroad shall consider conduct described in paragraph (d)(2) of this section that occurred within a period of five consecutive years prior to the review. A review of certification shall be initiated promptly upon the occurrence and documentation of any incident of conduct described in this paragraph (d).

(2) A railroad shall consider any violation of § 219.101 or § 219.102 of this chapter and any refusal to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative.

(3) A period of ineligibility described in this section shall begin:

(i) For a person not currently certified, on the date of the railroad's written determination that the most recent incident has occurred; or

(ii) For a person currently certified, on the date of the railroad's notification to the person that recertification has been denied or certification has been suspended.

(4) The period of ineligibility described in this section shall be determined in accordance with the following standards:

(i) In the case of one violation of § 219.102 of this chapter, the person shall be ineligible to hold a certificate during evaluation and any required primary treatment as described in paragraph (e) of this section. In the case of two violations of § 219.102 of this chapter, the person shall be ineligible to hold a certificate for a period of two years. In the case of more than two such violations, the person shall be ineligible to hold a certificate for a period of five years.

(ii) In the case of one violation of § 219.102 of this chapter and one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of three years.

(iii) In the case of one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of nine months (unless identification of the violation was through a qualifying referral program described in § 219.1001 of this chapter and the dispatcher waives investigation, in which case the certificate shall be deemed suspended during evaluation and any required primary treatment as described in

paragraph (e) of this section). In the case of two or more violations of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of five years.

(iv) If a person refuses to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative, the person shall be ineligible to hold a certificate for a period of nine months.

(e) *Future eligibility to hold certificate following alcohol/drug violation.* The following requirements apply to a person who has been denied certification or who has had their certification suspended or revoked as a result of conduct described in paragraph (d) of this section:

(1) The person shall not be eligible for grant or reinstatement of the certificate unless and until the person has:

(i) Been evaluated by a SAP to determine if the person currently has an active substance abuse disorder;

(ii) Successfully completed any program of counseling or treatment determined to be necessary by the SAP prior to return to service; and

(iii) In accordance with the testing procedures of 49 CFR part 219, subpart H, has had a return-to-duty alcohol test with an alcohol concentration of less than .02 and return-to-duty body fluid sample that tested negative for controlled substances.

(2) A dispatcher placed in service or returned to service under the above-stated conditions shall continue in any program of counseling or treatment deemed necessary by the SAP and shall be subject to a reasonable program of follow-up alcohol and drug testing without prior notice for a period of not more than five years following return to service. Follow-up tests shall include not fewer than six alcohol tests and six drug tests during the first year following return to service.

(3) Return-to-duty and follow-up alcohol and drug tests shall be performed consistent with the requirements of 49 CFR part 219, subpart H.

(4) This paragraph (e) does not create an entitlement to utilize the services of a railroad SAP, to be afforded leave from employment for counseling or treatment, or to employment as a dispatcher. Nor does it restrict any discretion available to the railroad to take disciplinary action based on conduct described herein.

(f) *Confidentiality protected.* Nothing in this part shall affect the responsibility of the railroad under § 219.1003(f) of this chapter to treat qualified referrals for substance abuse counseling and treatment as confidential; and the certification status of a dispatcher who is successfully assisted under the procedures of that section shall not be adversely affected. However, the railroad shall include in its referral policy, as required pursuant to § 219.1003(j) of this chapter, a provision that, at least with respect to a certified dispatcher or a candidate for certification, the policy of confidentiality is waived (to the extent that the railroad shall receive from the SAP or DAC official notice of the substance abuse disorder and shall suspend or revoke the certification, as appropriate) if the person at any time refuses to cooperate in a recommended course of counseling or treatment.

(g) *Complying with certification program.* Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.117 Vision acuity.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate, that the

person meets the standards for visual acuity prescribed in this section and Appendix B to this part.

(b) Any examination required under this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant.

(c) Except as provided in paragraph (d) of this section, each dispatcher shall have visual acuity that meets or exceeds the following thresholds:

(1) For distant viewing, either:

(i) Distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses; or

(ii) Distant visual acuity separately corrected to at least 20/40 (Snellen) with corrective lenses and distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses;

(2) A field of vision of at least 70 degrees in the horizontal meridian in each eye; and

(3) The ability to recognize and distinguish between the colors of railroad signals as demonstrated by successfully completing one of the tests in appendix B to this part.

(d) A person not meeting the thresholds in paragraph (c) of this section shall, upon request of the certification candidate, be subject to further medical evaluation by a railroad's medical examiner to determine that person's ability to safely perform as a dispatcher. In such cases, the following procedures will apply:

(1) In accordance with the guidance prescribed in appendix B to this part, a person is entitled to:

(i) One retest without making any showing; and

(ii) An additional retest if the person provides evidence that circumstances have changed since the last test to the extent that the person may now be able to safely perform as a dispatcher.

(2) The railroad shall provide its medical examiner with a copy of this part, including all appendices.

(3) If, after consultation with a railroad officer, the medical examiner concludes that, despite not meeting the threshold(s) in paragraph (c) of this section, the person has the ability to safely perform as a dispatcher, the railroad may conclude that the person satisfies the vision acuity requirements of this section to be a certified dispatcher. Such certification will be conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(e) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file the following for each certification candidate:

(1) A medical examiner's certificate that the candidate has been medically examined and either does or does not meet the vision acuity standards prescribed in paragraph (c) of this section.

(2) If needed under paragraph (d) of this section, a medical examiner's written professional opinion which states the basis for their determination that:

(i) The candidate can be certified, under certain conditions if necessary, even though the candidate does not meet the vision acuity standards prescribed in paragraph (c) of this section; or

(ii) The candidate's vision acuity prevents the candidate from being able to safely perform as a dispatcher.

(f) If the examination required under this section shows that the person needs corrective lenses to meet the standards for vision acuity prescribed in this section and appendix B to this part, that person shall use corrective lenses at all times while performing as a dispatcher unless the railroad's medical examiner subsequently determines in writing that the person can safely perform as a dispatcher without corrective lenses.

(g) When a certified dispatcher becomes aware that their vision has deteriorated, they shall notify the railroad's medical department or other appropriate railroad official of the deterioration. Such notification must occur prior to performing any subsequent service as a dispatcher. The individual cannot return to service as a dispatcher until they are reexamined and determined by the railroad's medical examiner to satisfy the vision acuity standards prescribed in this section and appendix B to this part.

(h) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.118 Hearing acuity.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate, that the person meets the standards for hearing acuity prescribed in this section and Appendix B to this part.

(b) Any examination required under this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant.

(c) Except as provided in paragraph (d) of this section, each dispatcher shall have hearing acuity that meets or exceeds the following thresholds with or without use of a hearing aid: The person does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz. The hearing test or audiogram used to show a person's hearing acuity shall meet the requirements of one of the following:

(1) As required in 29 CFR 1910.95(h) (Occupational Safety and Health Administration);

(2) As required in § 227.111 of this chapter; or

(3) Conducted using an audiometer that meets the specifications of and is maintained and used in accordance with a formal industry standard, such as American National Standards Institute (ANSI) S3.6, “Specifications for Audiometers.”

(d) A person not meeting the thresholds in paragraph (c) of this section shall, upon request of the certification candidate, be subject to further medical evaluation by a railroad’s medical examiner to determine that person’s ability to safely perform as a dispatcher. In such cases, the following procedures will apply:

(1) In accordance with the guidance prescribed in appendix B to this part, a person is entitled to:

(i) One retest without making any showing; and

(ii) An additional retest if the person provides evidence that circumstances have changed since the last test to the extent that the person may now be able to safely perform as a dispatcher.

(2) The railroad shall provide its medical examiner with a copy of this part, including all appendices.

(3) If, after consultation with a railroad officer, the medical examiner concludes that, despite not meeting the threshold(s) in paragraph (c) of this section, the person has the ability to safely perform as a dispatcher, the railroad may conclude that the person satisfies the hearing acuity requirements of this section to be a certified dispatcher. Such certification will be conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(e) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file the following for each certification candidate:

(1) A medical examiner’s certificate that the candidate has been medically examined and either does or does not meet the hearing acuity standards prescribed in paragraph (c) of this section.

(2) If needed under paragraph (d) of this section, a medical examiner's written professional opinion which states the basis for their determination that:

(i) The candidate can be certified, under certain conditions if necessary, even though the candidate does not meet the hearing acuity standards prescribed in paragraph (c) of this section; or

(ii) The candidate's hearing acuity prevents the candidate from being able to safely perform as a dispatcher.

(f) If the examination required under this section shows that the person needs a hearing aid to meet the standards for hearing acuity prescribed in this section and appendix B to this part, that person shall use a hearing aid at all times while performing as a dispatcher unless the railroad's medical examiner subsequently determines in writing that the person can safely perform as a dispatcher without a hearing aid.

(g) When a certified dispatcher becomes aware that their hearing has deteriorated, they shall notify the railroad's medical department or other appropriate railroad official of the deterioration. Such notification must occur prior to performing any subsequent service as a dispatcher. The individual cannot return to service as a dispatcher until they are reexamined and determined by the railroad's medical examiner to satisfy the hearing acuity standards prescribed in this section and appendix B to this part.

(h) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.119 Training requirements.

(a) After FRA has approved a railroad's certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate, that the person has successfully completed the training, in accordance with the requirements of this section.

(b) A railroad's certification program shall state the railroad's election either:

(1) To accept responsibility for the training of dispatchers and thereby obtain authority for that railroad to initially certify a person as a dispatcher; or

(2) To recertify only dispatchers previously certified by other railroads.

(c) A railroad that elects to accept responsibility for the training of dispatchers shall state in its certification program whether it will conduct the training program or employ a training program conducted by some other entity on its behalf but adopted and ratified by the railroad.

(d) A railroad that elects to train persons not previously certified as dispatchers shall develop an initial training program which, at a minimum, includes the following:

(1) An explanation of how training must be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, on-the-job training, or other formal training. The curriculum shall be designed to impart knowledge of, and ability to comply with, applicable Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those applicable Federal railroad safety laws, regulations, and orders. This training shall document a person's knowledge of, and ability to comply with, Federal railroad safety laws, regulations, and orders, as well as railroad rules and procedures.

(2) An on-the-job training component which shall include the following:

(i) A syllabus describing content, required tasks, and related steps the employee learning the job shall be able to perform within a specified timeframe;

(ii) A statement of the conditions (e.g., prerequisites, dispatch and related dispatch support systems, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and

(iii) A statement of the standards by which proficiency is measured through a combination of task/step accuracy, completeness, and repetition.

(3) A description of the processes to review and modify its training program when new safety-related railroad laws, regulations, orders, technologies, procedures, software, or equipment are introduced into the workplace, including how it is determined if additional or refresher training is needed.

(e) Prior to beginning the initial dispatching related tasks associated with on-the-job exercises discussed in paragraph (d)(2) of this section, each railroad shall make any relevant information or materials, such as operating rules, safety rules, or other rules, available for referencing by certification candidates.

(f) Prior to a person, not previously certified as a dispatcher, being certified as a dispatcher, a railroad shall require the person to:

(1) Successfully complete the formal initial training program developed pursuant to paragraph (d) of this section and any associated examinations covering the skills and knowledge the person will need to perform the tasks necessary to be a dispatcher;

(2) Demonstrate on-the-job proficiency, with input from a qualified instructor, by successfully completing the tasks and using the dispatching systems and technology necessary to be a dispatcher. A certification candidate may perform such tasks under the direct onsite supervision of a person who has the necessary dispatching experience and at least one year of experience as a dispatcher; and

(3) Demonstrate knowledge of the physical characteristics of any assigned territory. If the railroad uses a written test to fulfill this requirement, the railroad must

provide the certification candidate with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

(g) In making the determination required under paragraph (a) of the section, a railroad shall have written documentation showing that:

(1) The person completed a training program that complies with paragraph (d) of this section (if the person has not been previously certified as a dispatcher);

(2) The person demonstrated their knowledge by achieving a passing grade under the testing and evaluation procedures of the training program; and

(3) The person achieved a passing score on the physical characteristics exam associated with the territories, or its pertinent segments, over which the person will be performing dispatching service.

(h) The certification program, required under this part and submitted in accordance with the procedures and requirements described in § 245.107, shall include:

(1) The methods that a person may acquire familiarity with the physical characteristics of a territory;

(2) The procedures used to qualify and requalify a dispatcher on a territory; and

(3) The maximum time period in which a dispatcher can be absent from a territory before requalification is required. In accordance with § 245.120(c), this time period cannot exceed 12 months.

(i) If ownership of a railroad is being transferred from one company to another, the dispatchers of the acquiring company may receive familiarization training from the selling company prior to the acquiring company commencing operation.

(j) A railroad shall provide for the continuing education of certified dispatchers to ensure that each dispatcher maintains the necessary knowledge concerning:

(1) Railroad safety and operating rules;

(2) Physical territory:

(3) Dispatching systems and technology; and

(4) Compliance with all applicable Federal regulations including, but not limited to, hazardous materials, passenger train emergency preparedness, emergency response procedures, and physical characteristics of a territory.

(k) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.120 Requirements for territorial qualification.

(a) After FRA has approved a railroad's certification program, a railroad shall not permit or require a person to serve as a dispatcher on a particular territory unless that railroad determines that:

(1) The person is certified as a dispatcher; and

(2) The person either:

(i) Possesses the necessary territorial qualifications for the applicable territory pursuant to § 245.119; or

(ii) Is assisted by a Dispatcher Pilot who is qualified on the territory.

(b) If a person is called to serve on a territory that they are not qualified on, the person must immediately notify the railroad that they are not qualified on the assigned territory.

(c) A person shall no longer be considered qualified on a territory if they have not worked on that territory as a dispatcher in the previous 12 months.

(d) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a

program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.121 Knowledge testing.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate and in accordance with the requirements of this section, that the person has demonstrated sufficient knowledge of the railroad's rules and practices for the safe movement of trains.

(b) In order to make the knowledge determination required by paragraph (a) of this section, a railroad shall have procedures for testing a person being evaluated for certification as a dispatcher that shall be:

(1) Designed to examine a person's knowledge of the railroad's operating rules and practices for the safe movement of trains;

(2) Objective in nature;

(3) In written or electronic form;

(4) Covering the following subjects:

(i) Safety and operating rules;

(ii) Timetable instructions;

(iii) Compliance with all applicable Federal regulations;

(iv) Physical characteristics of the territory on which a person will be or is currently working as a dispatcher; and

(v) Dispatching systems and technology.

(5) Sufficient to accurately measure the person's knowledge of the covered subjects; and

(6) Conducted without open reference books or other materials except to the degree the person is being tested on their ability to use such reference books or materials.

(c) The railroad shall provide the certification candidate with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a test question.

(d) If a person fails the test, no railroad shall permit or require that person to function as a dispatcher prior to that person's achieving a passing score during a reexamination of the test.

(e) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.123 Monitoring operational performance.

(a) Each railroad's certification program shall describe how it will monitor the operational performance of its certified dispatchers by including procedures for:

(1) Giving each certified dispatcher at least one unannounced railroad and Federal rules, territorial and dispatch systems compliance test each calendar year, except as provided for in paragraph (c) of this section;

(2) Giving unannounced compliance tests to certified dispatchers who return to dispatcher service after performing service that does not require certification pursuant to this part, as described in paragraph (c) of this section; and

(3) What actions the railroad will take if it finds deficiencies in a dispatcher's performance during an unannounced compliance test.

(b) An unannounced compliance test shall:

(1) Test certified dispatchers for compliance with one or more operational tests in accordance with the provisions of § 217.9 of this chapter;

(2) Be performed by a railroad officer who meets the requirements of § 217.9(b)(1) of this chapter; and

(3) Be given to each certified dispatcher at least once each calendar year, except as provided for in paragraph (c) of this section.

(c) A certified dispatcher who is not performing service that requires certification pursuant to this part does not need to be given an unannounced compliance test.

However, when the certified dispatcher returns to service that requires certification pursuant to this part, the railroad shall:

(1) Give the certified dispatcher an unannounced compliance test within 30 days of their return to dispatcher service; and

(2) Retain a written record that includes the following information:

(i) The date the dispatcher stopped performing service that required certification pursuant to this part;

(ii) The date the dispatcher returned to service that required certification pursuant to this part; and

(iii) The date and the result of the unannounced compliance test that was performed following the dispatcher's return to service requiring certification.

(d) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.125 Certification determinations made by other railroads.

(a) A railroad that is considering certification of a person as a dispatcher may rely on certain determinations made by another railroad concerning that person's certification.

(b) A railroad's certification program shall address how the railroad will administer the training of previously uncertified dispatchers with extensive dispatching experience or previously certified dispatchers who have had their certification expire. If a railroad's certification program fails to specify how it will train these dispatchers, then the railroad shall require these dispatchers to successfully complete the certifying railroad's entire training program.

(c) A railroad relying on certification determinations made by another railroad shall still be responsible for determining that:

(1) The prior certification is still valid in accordance with the provisions of §§ 245.201 and 245.307;

(2) The person has received training on the physical characteristics of the new territory in accordance with § 245.119; and

(3) The person has demonstrated the necessary knowledge concerning the railroad's operating rules, territory, dispatch systems and technology in accordance with § 245.121.

Subpart C—Administration of the Certification Program

§ 245.201 Time limitations for certification.

(a) After FRA approves a railroad's dispatcher certification program, that railroad shall not certify or recertify a person as a dispatcher if the railroad is making:

(1) A determination concerning eligibility under §§ 245.111, 245.113, 245.115, and 245.303 and the eligibility data being relied on was furnished more than one year before the date of the railroad's certification decision;

(2) A determination concerning visual or hearing acuity and the medical examination being relied on was conducted more than 450 days before the date of the railroad's certification decision;

(3) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than one year before the date of the railroad's certification decision; or

(4) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than two years before the date of the railroad's recertification decision if the railroad administers a knowledge testing program pursuant to § 245.121 at intervals that do not exceed two years.

(b) The time limitations of paragraph (a) of this section do not apply to a railroad that is making a certification decision in reliance on determinations made by another railroad in accordance with § 245.125.

(c) Except if a person is designated as a certified dispatcher under § 245.105(c) or (d), no railroad shall certify a person as a dispatcher for an interval of more than three years.

(d) Each railroad shall issue each certified dispatcher a certificate that complies with § 245.207 no later than 30 days from the date of its decision to certify or recertify that person.

§ 245.203 Retaining information supporting determinations.

(a) After FRA approves a railroad's dispatcher certification program, any time the railroad issues, denies, or revokes a certificate after making the determinations required under § 245.109, it shall maintain a record for each certified dispatcher and certification candidate. Each record shall contain the information, described in paragraph (b) of this section, that the railroad relied on in making the determinations required under § 245.109.

(b) A railroad shall retain the following information:

(1) Relevant data from the railroad's records concerning the person's prior safety conduct and eligibility;

- (2) Relevant data furnished by another railroad;
 - (3) Relevant data furnished by a governmental agency concerning the person's motor vehicle driving record;
 - (4) Relevant data furnished by the person seeking certification concerning their eligibility;
 - (5) The relevant test results data concerning vision and hearing acuity;
 - (6) If applicable, the relevant data concerning the professional opinion of the railroad's medical examiner on the adequacy of the person's vision or hearing acuity;
 - (7) Relevant data from the railroad's records concerning the person's success or failure on knowledge test(s) under § 245.121;
 - (8) A sample copy of the written knowledge test or tests administered; and
 - (9) The relevant data from the railroad's records concerning the person's success or failure on unannounced tests the railroad performed to monitor the dispatcher's performance in accordance with § 245.123.
- (c) If a railroad is relying on successful completion of an approved training program conducted by another entity, the relying railroad shall maintain a record for each certification candidate that contains the relevant data furnished by the training entity concerning the person's demonstration of knowledge and relied on by the railroad in making its determinations.
- (d) If a railroad is relying on a certification decision initially made by another railroad, the relying railroad shall maintain a record for each certification candidate that contains the relevant data furnished by the other railroad which it relied on in making its determinations.
- (e) All records required under this section shall be retained by the railroad for a period of six years from the date of the certification, recertification, denial, or revocation

decision and shall, upon request, be made available to FRA representatives in a timely manner.

(f) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on the record(s) required by this section; or

(2) Otherwise falsify such records through material misstatement, omission, or mutilation.

(g) Nothing in this section precludes a railroad from maintaining the information required to be retained under this section in an electronic format provided that:

(1) The railroad maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or individual records;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) A record cannot be deleted or altered by any individual after the record is certified by the employee who created the record;

(3) Any amendment to a record is either:

(i) Electronically stored apart from the record that it amends; or

(ii) Electronically attached to the record as information without changing the original record;

(4) Each amendment to a record uniquely identifies the person making the amendment; and

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information which can be easily produced in an electronic or printed format that can be:

- (i) Provided to FRA representatives in a timely manner; and
- (ii) Authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by an FRA representative.

§ 245.205 List of certified dispatchers and recordkeeping.

(a) After a railroad's certification program has received its initial approval from FRA, pursuant to § 245.103(f)(1), the railroad must maintain a list of each person who is currently certified as a dispatcher by the railroad. The list must include the date of the railroad's certification decision and the date the person's certification expires.

(b) The list shall:

- (1) Be updated at least annually;
- (2) Be made available, upon request, to FRA representatives in a timely manner;

and

(3) Be available either:

- (i) In electronic format pursuant to paragraph (c) of this section; or
- (ii) At the divisional or regional headquarters of the railroad.

(c) If a railroad elects to maintain its list in an electronic format, it must:

(1) Maintain an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or the list;

(2) Have its program and data storage system protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

- (i) No two individuals have the same electronic identity; and

(ii) An entry on the list cannot be deleted or altered by any individual after the entry is certified by the employee who created the entry;

(3) Have any amendment to the list either:

(i) Electronically stored apart from the entry on the list that it amends; or

(ii) Electronically attached to the entry on the list as information without changing the original entry;

(4) Ensure that each amendment to the list uniquely identifies the person making the amendment; and

(5) Ensure that the system employed for data storage permits reasonable access and retrieval of the information which can be easily produced in an electronic or printed format that can be:

(i) Provided to FRA representatives in a timely manner; and

(ii) Authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by an FRA representative.

(d) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on the list required by this section; or

(2) Otherwise falsify such list through material misstatement, omission, or mutilation.

§ 245.207 Certificate requirements.

(a) Each person who becomes a certified dispatcher in accordance with this part shall be issued a paper or electronic certificate that must:

(1) Identify the railroad that is issuing the certificate;

(2) Indicate that it is a dispatcher certificate;

(3) Provide the following information about the certified person:

- (i) Name;
 - (ii) Employee identification number;
 - (iii) Year of birth; and
 - (iv) Either a physical description or photograph of the person;
- (4) Identify any conditions or limitations, including conditions to ameliorate vision or hearing acuity deficiencies, that restrict, limit, or alter the person's abilities to work as a dispatcher;
- (5) Show the effective date of the certification;
 - (6) Show the expiration date of the certification except as provided for in paragraph (b) of this section;
 - (7) Be signed by an individual designated in accordance with paragraph (c) of this section; and
 - (8) Be electronic or be of sufficiently small size to permit being carried in an ordinary pocket wallet.

(b) A certificate does not need to include an expiration date, as required under paragraph (a)(6) of this section, if the person was designated as a certified dispatcher under § 245.105(c) or (d).

(c) Each railroad shall designate in writing any person it authorizes to sign the certificates described in this section. The designation shall identify such persons by name or job title.

(d) Nothing in this section shall prohibit any railroad from including additional information on the certificate or supplementing the certificate through other documents.

(e) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on a certificate; or

(2) Otherwise falsify a certificate through material misstatement, omission, or mutilation.

(f) Except as provided for in paragraph (h) of this section, each certified dispatcher shall:

(1) Have their certificate in their possession while on duty as a dispatcher; and

(2) Display their certificate upon a request from:

(i) An FRA representative;

(ii) A state inspector authorized under part 212 of this chapter;

(iii) An officer of the issuing railroad; or

(iv) An officer of the dispatcher's employer if the dispatcher is not employed by the issuing railroad.

(g) If a dispatcher's certificate is lost, stolen, or mutilated, the railroad shall promptly replace the certificate at no cost to the dispatcher.

(h) A certified dispatcher is exempt from the requirements of paragraph (f) of this section if:

(1) The railroad made its certification or recertification decision within the last 30 days and the dispatcher has not yet received their certificate; or

(2) The dispatcher's certificate was lost, stolen, or mutilated, and the railroad has not yet issued a replacement certificate to the dispatcher.

(i) Any dispatcher who is notified or called to serve as a dispatcher and such service would cause the dispatcher to exceed certificate limitations, set forth in accordance with subpart B of this part, shall immediately notify the railroad that they are not authorized to perform that anticipated service and it shall be unlawful for the railroad to require such service.

(j) Nothing in this section shall be deemed to alter a certified dispatcher's duty to comply with other provisions of this chapter concerning railroad safety.

§ 245.213 Multiple certifications.

(a) A person who holds a dispatcher certificate may also be certified in other crafts, such as a locomotive engineer or conductor.

(b) A railroad that issues multiple certificates to a person, shall, to the extent possible, coordinate the expiration date of those certificates.

(c) (1) A person who holds a current dispatcher certificate from more than one railroad shall immediately notify the other certifying railroad(s) if they are denied dispatcher certification or recertification under § 245.301 by another railroad or has their dispatcher certification suspended or revoked under § 245.307 by another railroad.

(2) If a person has their dispatcher certification suspended or revoked by a railroad under § 245.307, they may not work as a dispatcher for any other railroad during the period that their certification is suspended or revoked.

(3) If a person has their dispatcher certification suspended or revoked by a railroad under § 245.307, they must notify any railroad that they are seeking certification from that their dispatcher certification is currently suspended or revoked by another railroad.

(d) Paragraphs (d)(1) through (4) apply to people who are currently certified as a dispatcher and also currently certified in another craft, such as a locomotive engineer or conductor:

(1) If a person's dispatcher certification is revoked under § 245.307 for a violation of § 245.303(e)(8), they may not work in another certified craft, such as a locomotive engineer or conductor, for any railroad during the period of revocation.

(2) If a person's dispatcher certification is revoked under § 245.307 for a violation of § 245.303(e)(1) through (7), they may work in another certified craft, such as a locomotive engineer or conductor, during the period of revocation.

(3) If any of a person's non-dispatcher certifications are revoked for failure to comply with § 219.101 of this chapter, they may not work as a dispatcher for any railroad during the period of revocation.

(4) If any of a person's non-dispatcher certifications are revoked for any reason other than a failure to comply with § 219.101 of this chapter, they may work as a dispatcher during the period of revocation.

(e) A person who has had their dispatcher certification revoked for failure to comply with § 219.101 of this chapter, may not obtain any other certification pursuant to this chapter from any railroad during the period of revocation.

(f) A person who has had any of their non-dispatcher certifications revoked for failure to comply with § 219.101 of this chapter, may not obtain a dispatcher certificate pursuant to this part from any railroad during the period of revocation.

(g) A railroad that denies a person dispatcher certification or recertification under § 245.301 shall not, solely on the basis of that denial, deny or revoke that person's non-dispatcher certifications or recertifications.

(h) A railroad that denies a person any non-dispatcher certification pursuant to this chapter shall not, solely on the basis of that denial, deny or revoke that person's dispatcher certification or recertification.

(i) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified in multiple crafts as long as the single certificate complies with all of the certificate requirements for those crafts.

(j) A person who is certified in multiple crafts and who is involved in a revocable event, as described in this chapter, may only have one certificate revoked for that event. The determination by the railroad as to which certificate to revoke must be based on the work the person was performing at the time the revocable event occurred.

§ 245.215 Railroad oversight responsibilities.

(a) No later than March 31 of each year (beginning in calendar year [DATE THREE YEARS AFTER EFFECTIVE DATE OF FINAL RULE], each Class I railroad (including the National Railroad Passenger Corporation), each railroad providing commuter service, and each Class II railroad shall conduct a formal annual review and analysis concerning the administration of its program for responding to detected instances of poor safety conduct by certified dispatchers during the prior calendar year.

(b) Each review and analysis shall involve:

(1) The number and nature of the instances of detected poor safety conduct including the nature of the remedial action taken in response thereto;

(2) The number and nature of FRA reported train accidents attributed to poor safety performance by dispatchers; and

(3) The number and type of operational monitoring test failures recorded by railroad officers who meet the requirements of § 217.9(b)(1) of this chapter.

(c) Based on that review and analysis, each railroad shall determine what action(s) it will take to improve the safety of railroad operations to reduce or eliminate future incidents of that nature.

(d) If requested in writing by FRA, the railroad shall provide a report of the findings and conclusions reached during such annual review and analysis effort.

(e) For reporting purposes, information about the nature of detected poor safety conduct shall be capable of segregation for study and evaluation purposes into the following categories:

(1) Incidents involving failure to provide proper protection of a reported inoperable or malfunctioning highway-rail grade crossing.

(2) Incidents involving granting permission for a train or on-track equipment to enter into an out-of-service or blue flag protected track.

(3) Incidents involving granting permission for a train or on-track equipment to enter into established RWIC limits without authority or permission from the RWIC.

(4) Incidents involving removal of blocking devices or established protection of RWIC working limits prior to the RWIC releasing the limits.

(5) Incidents involving failure to properly apply blocking devices or failure to establish proper protection for specified working limits or movements of trains or on-track equipment.

(6) Incidents involving failure to properly issue or apply mandatory directives when warranted.

(7) Incidents involving granting permission for a train to enter Positive Train Control (PTC) or Cab Signal limits with inoperative or malfunctioning PTC or Cab Signal equipment without proper approval.

(8) Incidents involving noncompliance with part 219 of this chapter.

(f) For reporting purposes, each category of detected poor safety conduct identified in paragraph (e) of this section shall be capable of being annotated to reflect the following:

(1) The total number of incidents in that category;

(2) The number of incidents within that total which reflect incidents requiring an FRA accident/incident report under part 225 of this chapter; and

(3) The number of incidents within that total which were detected as a result of a scheduled operational monitoring effort.

(g) For reporting purposes, each instance of detected poor safety conduct identified in paragraph (b) of this section shall be capable of being annotated to reflect the following:

(1) The nature of the remedial action taken, and the number of events subdivided, so as to reflect which of the following actions was selected:

- (i) Imposition of informal discipline;
- (ii) Imposition of formal discipline;
- (iii) Provision of informal training; or
- (iv) Provision of formal training; and

(2) If the nature of the remedial action taken was formal discipline, the number of events further subdivided so as to reflect which of the following punishments was imposed by the railroad:

- (i) The person was withheld from service;
- (ii) The person was dismissed from employment; or
- (iii) The person was issued demerits. If more than one form of punishment was imposed, only the punishment deemed the most severe shall be shown.

(h) For reporting purposes, each instance of detected poor safety conduct identified in paragraph (b) of this section which resulted in the imposition of formal or informal discipline shall be annotated to reflect the following:

(1) The number of instances in which the railroad's internal appeals process reduced the punishment initially imposed at the conclusion of its hearing; and

(2) The number of instances in which the punishment imposed by the railroad was reduced by any of the following entities: The National Railroad Adjustment Board, a Public Law Board, a Special Board of Adjustment, or other body for the resolution of disputes duly constituted under the provisions of the Railway Labor Act.

(i) For reporting purposes, an instance of poor safety conduct involving a person who is a certified dispatcher and is certified in another craft, such as a locomotive engineer or conductor, need only be reported once (e.g., either under this section or § 240.309 or § 242.215 of this chapter). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred.

Subpart D—Denial and Revocation of Certification

§ 245.301 Process for denying certification.

(a) A railroad shall notify a candidate for certification or recertification of information known to the railroad that forms the basis for denying the person certification and provide the person a reasonable opportunity to explain or rebut that adverse information in writing prior to denying certification. A railroad shall provide the dispatcher candidate with any documents or records, including written statements, related to failure to meet a requirement of this part which support its pending denial decision.

(b) If a railroad denies a person certification or recertification, it shall issue a decision that complies with all of the following requirements:

- (1) It must be in writing.
- (2) It must explain the basis for the railroad's denial decision.
- (3) It must address any explanation or rebuttal information that the certification candidate provided pursuant to paragraph (a) of this section.
- (4) It must include the date of the railroad's decision.
- (5) It must be served on the candidate no later than 10 days after the railroad's decision.

(c) A railroad shall not deny the person's certification for failing to comply with a railroad operating rule or practice which constitutes a violation under § 245.303(e)(1) through (7) if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the dispatcher's ability to comply with that railroad operating rule or practice.

§ 245.303 Criteria for revoking certification.

(a) It shall be unlawful to fail to comply with any of the railroad rules or practices described in paragraph (e) of this section.

(b) A certified dispatcher who has demonstrated a failure to comply with a railroad rule or practice described in paragraph (e) of this section shall have their certification revoked.

(c) A certified dispatcher who is monitoring, piloting, or instructing a dispatcher and fails to take appropriate action to prevent a violation of a railroad rule or practice described in paragraph (e) of this section shall have their certification revoked.

Appropriate action does not mean that a supervisor, pilot, or instructor must prevent a violation from occurring at all costs; the duty may be met by warning the dispatcher of a potential or foreseeable violation.

(d) A certified dispatcher who is called by a railroad to perform a duty other than that of a dispatcher shall not have their dispatcher certification revoked based on actions taken or not taken while performing that duty except for violations described in paragraph (e)(8) of this section.

(e) When determining whether to revoke a dispatcher's certification, a railroad shall only consider violations of its operating rules or practices that involve:

(1) Failure to provide proper protection of a reported inoperable or malfunctioning highway-rail grade crossing.

(2) Granting permission for a train or on-track equipment to enter into an out-of-service or blue flag protected track.

(3) Granting permission for a train or on-track equipment to enter into established RWIC limits without authority or permission from the RWIC.

(4) Removal of blocking devices or established protection of RWIC working limits prior to the RWIC releasing the limits.

(5) Failure to properly apply blocking devices or establish proper protection for specified working limits or movements of trains or on-track equipment.

(6) Failure to properly issue or apply mandatory directives when warranted.

(7) Granting permission, without prior approval, for a train to enter Positive Train Control (PTC) or Cab Signal limits with inoperative or malfunctioning PTC or Cab Signal equipment.

(8) Failure to comply with § 219.101 of this chapter. However, such incidents shall be considered as a violation only for the purposes of § 245.305(a)(2) and (b).

(f) In making the determination as to whether to revoke a dispatcher's certification, a railroad shall only consider conduct described in paragraphs (e)(1) through (7) of this section that occurred within the three years prior to the determination.

(g) If in any single incident the person's conduct contravened more than one operating rule or practice, that event shall be treated as a single violation for the purposes of this section.

(h) A violation of one or more operating rules or practices described in paragraphs (e)(1) through (7) of this section that occurs during a properly conducted operational compliance test subject to the provisions of this chapter shall be counted in determining the periods of ineligibility described in § 245.305.

(i) An operational test that is not conducted in compliance with this part, a railroad's operating rules, or a railroad's program under § 217.9 of this chapter, will not be considered a legitimate test of operational skill or knowledge, and will not be considered for revocation purposes.

(j) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.305 Periods of ineligibility.

(a) The starting date for a period of ineligibility described in this section shall be:

(1) For a person not currently certified, the date of the railroad's written determination that the most recent incident has occurred; or

(2) For a person currently certified, the date of the railroad's notification to the person that recertification has been denied or certification has been suspended.

(b) A period of ineligibility shall be determined according to the following standards:

(1) In the case of a single incident involving a violation of one or more of the operating rules or practices described in § 245.303(e)(1) through (7), the person shall have their certificate revoked for a period of 30 calendar days.

(2) In the case of two separate incidents involving a violation of one or more of the operating rules or practices described in § 245.303(e)(1) through (7), that occurred within 24 months of each other, the person shall have their certificate revoked for a period of 6 months.

(3) In the case of three separate incidents involving violations of one or more of the operating rules or practices, described in § 245.303(e)(1) through (8), that occurred within 36 months of each other, the person shall have their certificate revoked for a period of 1 year.

(4) In the case of four separate incidents involving violations of one or more of the operating rules or practices, described in § 245.303(e)(1) through (8), that occurred within 36 months of each other, the person shall have their certificate revoked for a period of 3 years.

(5) Where, based on the occurrence of violations described in § 245.303(e)(8), different periods of ineligibility may result under the provisions of this section and § 245.115, the longest period of revocation shall control.

(c) Any or all periods of revocation provided in paragraph (b) of this section may consist of training.

(d) A person whose certification is denied or revoked shall be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of ineligibility only if:

(1) The denial or revocation of certification in accordance with the provisions of paragraph (b) of this section is for a period of one year or less;

(2) Certification is denied or revoked for reasons other than noncompliance with § 219.101 of this chapter;

(3) The person is evaluated by a railroad officer and determined to have received adequate remedial training;

(4) The person successfully completes any mandatory program of training or retraining, if that is determined to be necessary by the railroad prior to return to service; and

(5) At least one half the pertinent period of ineligibility specified in paragraph (b) of this section has elapsed.

§ 245.307 Process for revoking certification.

(a) If a railroad determines that a dispatcher, who is currently certified by the railroad, has violated a railroad operating rule or practice described in § 245.303(e), the railroad shall revoke the dispatcher's certification in accordance with the procedures and requirements of this section.

(b) Except as providing for in § 245.115(f), if a railroad acquires reliable information that a dispatcher, who is currently certified by the railroad, has violated a railroad operating rule or practice described in §§ 245.303(e) or 245.115(d), the railroad shall undergo the following process to determine whether revocation of the dispatcher's certification is warranted:

(1) The dispatcher's certification shall be suspended immediately.

(2) Prior to or upon suspending the dispatcher's certification, the railroad shall provide the dispatcher with notice of: the reason for the suspension; the pending revocation; and an opportunity for a hearing before a presiding officer other than the investigating officer. This notice may initially be given either orally or in writing. If given orally, the notice must be subsequently confirmed in writing in a manner that conforms with the notification provisions of the applicable collective bargaining agreement. If there is no applicable collective bargaining agreement notification provision, the written notice must be made within four days of the date the certification was suspended.

(3) The railroad must convene the hearing within the time frame required under the applicable collective bargaining agreement. If there is no applicable collective bargaining agreement or the applicable collective bargaining agreement does not include such a requirement, the hearing shall be convened within 10 days of the date the certification is suspended unless the dispatcher requests or consents to a delay to the start of the hearing.

(4) No later than the start of the hearing, the railroad shall provide the dispatcher with a copy of the written information and a list of witnesses the railroad will present at the hearing. If this information was provided just prior to the start of the hearing and the dispatcher requests a recess to the start of the hearing, such request must be granted. If this information was provided by an employee of the railroad, the railroad shall make that employee available for examination during the hearing.

(5) Following the hearing, the railroad must determine, based on the record of the hearing, whether revocation of the certification is warranted. The railroad shall have the burden of proving that revocation of the dispatcher's certification is warranted under § 245.303.

(6) If the railroad determines that revocation of the dispatcher's certification is warranted, the railroad shall impose the proper period of revocation provided for in § 245.305 or § 245.115.

(7) The railroad shall retain the record of the hearing for three years after the date the decision is rendered.

(c) A hearing required by this section which is conducted in a manner that conforms procedurally to the applicable collective bargaining agreement shall satisfy the procedural requirements of this section.

(d) Except as provided for in paragraph (c) of this section, a hearing required under this section shall be conducted in accordance with the following procedures:

(1) The hearing shall be conducted by a presiding officer who can be any proficient person authorized by the railroad other than the investigating officer.

(2) The presiding officer shall convene and preside over the hearing and exercise the powers necessary to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in dispute.

(3) The presiding officer may:

(i) Adopt any needed procedures for the submission of evidence in written form;

(ii) Examine witnesses at the hearing; and

(iii) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may assist in achieving a prompt and fair determination of all material issues in dispute.

(4) All relevant and probative evidence shall be received into the record unless the presiding officer determines the evidence to be unduly repetitive or have such minimal relevance that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(5) Parties may appear at the hearing and be heard on their own behalf or through designated representatives. Parties may offer relevant evidence including testimony and may conduct such examination of witnesses as may be required for a full disclosure of the relevant facts.

(6) Testimony by witnesses at the hearing shall be recorded verbatim. Witnesses can testify in person, over the phone, or virtually.

(7) The record in the proceeding shall be closed at the conclusion of the hearing unless the presiding officer allows additional time for the submission of evidence.

(8) A hearing required under this section may be consolidated with any disciplinary action or other hearing arising from the same facts.

(9) A person may waive their right to a hearing. That waiver shall:

(i) Be in writing;

(ii) Reflect the fact that the person has knowledge and understanding of these rights and voluntarily surrenders them; and

(iii) Be signed by the person making the waiver.

(e) Except as provided for in paragraph (c) of this section, a decision, required by this section, on whether to revoke a dispatcher's certification shall comply with the following requirements:

(1) No later than 10 days after the close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision as to whether the railroad is revoking the dispatcher's certification.

(2) The decision shall:

(i) Contain the findings of fact on all material issues as well as an explanation for those findings with citations to all applicable railroad operating rules and practices;

(ii) State whether the railroad official found that the dispatcher's certification should be revoked;

(iii) State the period of revocation under § 245.305 (if the railroad official concludes that the dispatcher's certification should be revoked); and

(iv) Be served on the employee and the employee's representative, if any, with the railroad retaining proof of service for three years after the date the decision is rendered.

(f) The period that a dispatcher's certification is suspended in accordance with paragraph (b)(1) of this section shall be credited towards any period of revocation that the railroad assesses in accordance with § 245.305.

(g) A railroad shall revoke a dispatcher's certification if, during the period that certification is valid, the railroad acquires information which convinces it that another railroad has revoked the person's dispatcher certification in accordance with the provisions of this section. Such revocation shall end on the same date that the revocation period ends for the railroad that initially revoked the person's certification. The requirement to provide a hearing under this section is satisfied when any single railroad holds a hearing. No additional hearing is required prior to a revocation by more than one railroad arising from the same facts.

(h) A railroad shall not revoke a dispatcher's certification if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the dispatcher's ability to comply with the railroad operating rule or practice which constitutes a violation under § 245.303.

(i) A railroad may decide not to revoke a dispatcher's certification if sufficient evidence exists to establish that the violation of the railroad operating rule or practice described in § 245.303(e) was of a minimal nature and had no direct or potential effect on rail safety.

(j) If sufficient evidence meeting the criteria in paragraph (h) or (i) of this section becomes available, the railroad shall place the relevant information in the records maintained in compliance with:

(1) Section 245.215 for Class I railroads (including that National Railroad Passenger Corporation), railroads providing commuter service, and Class II railroads; and

(2) Section 245.203 for Class III railroads.

(k) If a railroad makes a good faith determination, after performing a reasonable inquiry, that the course of conduct provided for in paragraph (h) or (i) of this section is warranted, the railroad will not be in violation of paragraph (b)(1) of this section if it decides not to suspend the dispatcher's certification.

Subpart E—Dispute Resolution Procedures

§ 245.401 Review board established.

(a) Any person who has been denied certification, denied recertification, or has had their certification revoked and believes that a railroad incorrectly determined that they failed to meet the certification requirements of this part when making the decision to deny or revoke certification, may petition the Administrator to review the railroad's decision.

(b) The Administrator has delegated initial responsibility for adjudicating such disputes to the Certification Review Board (Board). The Board shall be composed of FRA employees.

§ 245.403 Petition requirements.

(a) To obtain review of a railroad's decision to deny certification, deny recertification, or revoke certification, a person shall file a petition for review that complies with this section.

(b) Each petition shall:

(1) Be in writing;

(2) Be filed no more than 120 days after the date the railroad's denial or revocation decision was served on the petitioner, except as provided for in paragraph (d) of this section;

(3) Be filed on <https://www.regulations.gov>.

(4) Include the following contact information for the petitioner and petitioner's representative (if petitioner is represented):

(i) Full name;

(ii) Daytime telephone number; and

(iii) Email address;

(5) Include the name of the railroad;

(6) Contain the facts that the petitioner believes constitute the improper action by the railroad and the arguments in support of the petition; and

(7) Include all written documents in the petitioner's possession or reasonably available to the petitioner that document the railroad's decision.

(c) If requested by the Board, the petitioner must provide a copy of the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees. The petitioner must provide a written explanation in response to a Board request if written documents, that should be reasonably available to the petitioner, are not supplied.

(d) The Board may extend the petition filing period in its discretion provided that the petitioner provides good cause for the extension and:

(1) The request for an extension is filed before the expiration of the period provided for in paragraph (b)(2) of this section; or

(2) The failure to timely file was the result of excusable neglect.

(e) A party aggrieved by a Board decision to deny a petition as untimely or not in compliance with the requirements of this section may file an appeal with the Administrator in accordance with § 245.411.

§ 245.405 Processing certification review petitions.

(a) Each petition shall be acknowledged in writing by FRA. The acknowledgment shall be sent to the petitioner (if an email address is provided), petitioner's representative (if any), and the railroad. The acknowledgment shall contain the docket number assigned to the petition and will notify the parties where the petition can be accessed.

(b) Within 60 days from the date of the acknowledgment provided in paragraph (a) of this section, the railroad may submit to FRA any information that the railroad considers pertinent to the petition, and shall supplement the record with any relevant documents in its possession, such as hearing transcripts and exhibits, that were not submitted by the petitioner. Late filings will only be considered to the extent practicable. A railroad that submits such information shall:

- (1) Identify the petitioner by name and the docket number for the petition;
- (2) Provide the railroad's email address;
- (3) Serve a copy of the information being submitted to the petitioner and petitioner's representative, if any; and
- (4) Be filed on <https://www.regulations.gov>.

(c) The petition will be referred to the Board for a decision after a railroad's response is received or 60 days from the date of the acknowledgment provided in paragraph (a) of this section, whichever is earlier. Based on the record, the Board shall have the authority to grant, deny, dismiss, or remand the petition. If the Board finds that there is insufficient basis for granting or denying the petition, the Board may issue an

order affording the parties an opportunity to provide additional information or argument consistent with its findings.

(d) When considering procedural issues, the Board will grant the petition if the petitioner shows:

- (1) That a procedural error occurred; and
- (2) The procedural error caused substantial harm to the petitioner.

(e) When considering factual issues, the Board will grant the petition if the petitioner shows that the railroad did not provide substantial evidence to support its decision.

(f) When considering legal issues, the Board will determine whether the railroad's legal interpretations are correct based on a *de novo* review.

(g) The Board will only consider whether the denial or revocation of certification or recertification was improper under this part and will grant or deny the petition accordingly. The Board will not otherwise consider the propriety of a railroad's decision. For example, the Board will not consider whether the railroad properly applied its own more stringent requirements.

(h) The Board's written decision shall be served on the petitioner and/or petitioner's representative (if any), and the railroad.

§ 245.407 Request for a hearing.

(a) If adversely affected by the Board's decision, either the petitioner before the Board or the railroad involved shall have a right to an administrative proceeding as prescribed by § 245.409.

(b) To exercise that right, the adversely affected party shall file a written request for a hearing within 20 days of service of the Board's decision on that party. The request must be filed in the docket on <https://www.regulations.gov> that was used when the case was before the Board.

(c) A written request for a hearing must contain the following:

- (1) The name, telephone number, and email address of the requesting party and the requesting party's designated representative (if any);
- (2) The name, telephone number, and email address of the respondent;
- (3) The docket number for the case while it was before the Board;
- (4) The specific factual issues, industry rules, regulations, or laws that the requesting party alleges need to be examined in connection with the certification decision in question; and
- (5) The signature of the requesting party or the requesting party's representative (if any).

(d) Upon receipt of a hearing request complying with paragraph (c) of this section, FRA shall arrange for the appointment of a presiding officer who shall schedule the hearing for the earliest practicable date.

(e) If a party fails to request a hearing within the period provided in paragraph (b) of this section, the Board's decision will constitute final agency action.

§ 245.409 Hearings.

(a) An administrative hearing for a dispatcher certification petition shall be conducted by a presiding officer, who can be any person authorized by the Administrator.

(b) The presiding officer shall convene and preside over the hearing. The hearing shall be a *de novo* hearing to find the relevant facts and determine the correct application of this part to those facts. The presiding officer may determine that there is no genuine issue covering some or all material facts and limit evidentiary proceedings to any issues of material fact as to which there is a genuine dispute.

(c) The presiding officer may exercise the powers of the Administrator to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(d) The presiding officer may authorize discovery of the types and quantities which in the presiding officer's discretion will contribute to a fair hearing without unduly burdening the parties. The presiding officer may impose appropriate non-monetary sanctions, including limitations as to the presentation of evidence and issues, for any party's willful failure or refusal to comply with approved discovery requests.

(e) Every petition, motion, response, or other authorized or required document shall be signed by the party filing the same, or by a duly authorized officer or representative of record, or by any other person. If signed by such other person, the reason therefor must be stated and the power of attorney or other authority authorizing such other person to subscribe the document must be filed with the document. The signature of the person subscribing any document constitutes a certification that they have read the document; that to the best of their knowledge, information, and belief every statement contained in the document is true and no such statements are misleading; and that it is not interposed for delay or to be vexatious.

(f) After the request for a hearing is filed, all documents filed or served upon one party must be served upon all parties. Each party may designate a person upon whom service is to be made when not specified by law, regulation, or directive of the presiding officer. If a party does not designate a person upon whom service is to be made, then service may be made upon any person having subscribed to a submission of the party being served, unless otherwise specified by law, regulation, or directive of the presiding officer. Proof of service shall accompany all documents when they are tendered for filing.

(g) If any document initiating, filed in, or served in, a proceeding is not in substantial compliance with the applicable law, regulation, or directive of the presiding officer, the presiding officer may strike or dismiss all or part of such document, or require its amendment.

(h) Any party to a proceeding may appear and be heard in person or by an authorized representative.

(i) Any person testifying at a hearing or deposition may be accompanied, represented, and advised by an attorney or other representative, and may be examined by that person.

(j) Any party may request to consolidate or separate the hearing of two or more petitions by motion to the presiding officer, when they arise from the same or similar facts or when the matters are for any reason deemed more efficiently heard together.

(k) Except as provided in § 245.407(e) and paragraph (s)(4) of this section, whenever a party has the right or is required to take action within a period prescribed by this part, or by law, regulation, or directive of the presiding officer, the presiding officer may extend such period, with or without notice, for good cause, provided another party is not substantially prejudiced by such extension. A request to extend a period which has already expired may be denied as untimely.

(l) An application to the presiding officer for an order or ruling not otherwise specifically provided for in this part shall be by motion. The motion shall be filed with the presiding officer and, if written, served upon all parties. All motions, unless made during the hearing, shall be written. Motions made during hearings may be made orally on the record, except that the presiding officer may direct that any oral motion be reduced to writing. Any motion shall state with particularity the grounds therefor and the relief or order sought and shall be accompanied by any affidavits or other evidence desired to be relied upon which is not already part of the record. Any matter submitted in response to a written motion must be filed and served within 14 days of the motion, or within such other period as directed by the presiding officer.

(m) Testimony by witnesses at the hearing shall be given under oath and the hearing shall be recorded verbatim. The presiding officer shall give the parties to the

proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the presiding officer. The presiding officer may permit oral argument on any issues for which the presiding officer deems it appropriate and beneficial. Any evidence or argument received or proffered orally shall be transcribed and made a part of the record. Any physical evidence or written argument received or proffered shall be made a part of the record, except that the presiding officer may authorize the substitution of copies, photographs, or descriptions, when deemed to be appropriate.

(n) The presiding officer shall employ the Federal Rules of Evidence for United States Courts and Magistrates as general guidelines for the introduction of evidence. Notwithstanding paragraph (m) of this section, all relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(o) The presiding officer may:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas as provided for in § 209.7 of this chapter;
- (3) Adopt any needed procedures for the submission of evidence in written form;
- (4) Examine witnesses at the hearing;
- (5) Convene, recess, adjourn, or otherwise regulate the course of the hearing; and
- (6) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(p) The petitioner before the Board, the railroad involved in taking the certification action, and FRA shall be parties at the hearing. All parties may participate in the hearing and may appear and be heard on their own behalf or through designated

representatives. All parties may offer relevant evidence, including testimony, and may conduct such cross-examination of witnesses as may be required to make a record of the relevant facts.

(q) The party requesting the administrative hearing shall be the “hearing petitioner.” The party that the Board issued its decision in favor of will be a respondent. At the start of each proceeding, FRA will be a respondent as well. The hearing petitioner shall have the burden of proving its case by a preponderance of the evidence.

(r) The record in the proceeding shall be closed at the conclusion of the evidentiary hearing unless the presiding officer allows additional time for the submission of additional evidence. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.

(s) At the close of the record, the presiding officer shall prepare a written decision in the proceeding. The decision:

(1) Shall contain the findings of fact and conclusions of law, as well as the basis for each, concerning all material issues of fact or law presented on the record;

(2) Shall be served on all parties to the proceeding;

(3) Shall not become final for 35 days after issuance;

(4) Constitutes final agency action unless an aggrieved party files an appeal within 35 days after issuance; and

(5) Is not precedential.

§ 245.411 Appeals.

(a) Any party aggrieved by the presiding officer's decision may file an appeal in the presiding officer's docket. The appeal must be filed within 35 days of issuance of the decision. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the presiding officer's decision, supported by reference to applicable laws

and regulations and with specific reference to the record. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.

(b) A party may file a reply to the appeal within 25 days of service of the appeal. The reply shall be supported by reference to applicable laws and regulations and with specific reference to the record, if the party relies on evidence contained in the record.

(c) The Administrator may extend the period for filing an appeal or a response for good cause shown, provided that the written request for extension is served before expiration of the applicable period provided in this section.

(d) The Administrator has sole discretion to permit oral argument on the appeal. On the Administrator's own initiative or written motion by any party, the Administrator may grant the parties an opportunity for oral argument.

(e) The Administrator may remand, vacate, affirm, reverse, alter, or modify the decision of the presiding officer and the Administrator's decision constitutes final agency action except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted.

(f) An appeal from a Board decision pursuant to § 245.403(e) must be filed in the Board's docket within 35 days of issuance of the decision. A copy of the appeal shall be served on each party. The Administrator may affirm or vacate the Board's decision, and may remand the petition to the Board for further proceedings. An Administrator's decision to affirm the Board's decision constitutes final agency action.

Appendix A to Part 245 – Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data

(1) The purpose of this appendix is to outline the procedures available to individuals and railroads for complying with the proposed requirements of § 245.111 of this chapter. This provision requires that railroads consider the motor vehicle driving

record of each person prior to issuing him or her certification or recertification as a dispatcher.

(2) To fulfill that obligation, a railroad is required to review a certification candidate's recent motor vehicle driving record. Generally, that will be a single record on file with the State agency that issued the candidate's current motor vehicle driver's license. However, a motor vehicle driving record can include multiple documents if the candidate has been issued a motor vehicle driver's license by more than one State agency or a foreign country.

Access to State Motor Vehicle Driving Record Data

(3) The right of railroad workers, their employers, or prospective employers to have access to a State motor vehicle licensing agency's data concerning an individual's driving record is controlled by state law. Although many States have mechanisms through which employers and prospective employers, such as railroads, can obtain such data, there are some states where privacy concerns make such access very difficult or impossible. Since individuals are generally entitled to obtain access to their driving record data that will be relied on by a State motor vehicle licensing agency when that agency is taking action concerning their driving privileges, FRA places the responsibility on individuals who want to serve as dispatchers to request that their current state motor vehicle licensing agency (or agencies) furnish such data directly to the railroad that is considering certification (or recertification) of the individual as a dispatcher. Depending on the procedures established by the state motor vehicle licensing agency, the individual may be asked to send the State agency a brief letter requesting such action or to execute a state agency form that accomplishes the same effect. Requests for an individual's motor vehicle driving record normally involve payment of a nominal fee established by the State agency as well. In rare instances, when a certification (or recertification) candidate

has been issued multiple licenses, an individual may be required to submit multiple requests.

(4) Once the railroad has obtained the individual's motor vehicle driving record(s), the railroad is required to afford the certification (or recertification) candidate an opportunity to review and comment on the record(s) in writing pursuant to § 245.301. The railroad is also required to provide this review opportunity before the railroad renders a decision based on information in the record(s). The railroad is required to evaluate the information in the certification (or recertification) candidate's motor vehicle driving record(s) pursuant to the provisions of this part.

Appendix B to Part 245 – Medical Standards Guidelines

(1) The purpose of this appendix is to provide greater guidance on the procedures that should be employed in administering the vision and hearing requirements of §§ 245.117 and 245.118.

(2) For any examination performed to determine whether a person meets the vision acuity requirements in § 245.117, it is recommended that such examination be performed by a licensed optometrist or a technician who reports to a licensed optometrist. It is also recommended that any test conducted pursuant to § 245.117 be performed according to any directions supplied by the test's manufacturer and any ANSI standards that are applicable.

(3) For any examination performed to determine whether a person meets the hearing acuity requirements in § 245.118, it is recommended that such examination be performed by a licensed or certified audiologist or a technician who reports to a licensed or certified audiologist. It is also recommended that any test conducted pursuant to § 245.118 be performed according to any directions supplied by the test's manufacturer and any ANSI standards that are applicable.

(4) In determining whether a person has the visual acuity that meets or exceeds the requirements of this part, the following testing protocols are deemed acceptable testing methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry. The acceptable test methods are shown in the left-hand column and the criteria that should be employed to determine whether a person has failed the particular testing protocol are shown in the right-hand column.

Table 1 to Appendix B of Part 245

Accepted tests	Failure criteria
Pseudoisochromatic Plate Tests	
American Optical Company 1965	5 or more errors on plates 1-15.
AOC – Hardy-Rand-Ritter plates – second edition	Any error on plates 1-6 (plates 1-4 are for demonstration - test plate 1 is actually plate 5 in book).
Dvorine – Second edition	3 or more errors on plates 1-15.
Ishihara (14 plate)	2 or more errors on plates 1-11.
Ishihara (16 plate)	2 or more errors on plates 1-8.
Ishihara (24 plate)	3 or more errors on plates 1-15.
Ishihara (38 plate)	4 or more errors on plates 1-21.
Richmond Plates 1983	5 or more errors on plates 1-15.
Multifunction Vision Tester	
Keystone Orthoscope	Any error.
OPTEC 2000	Any error.
Titmus Vision Tester	Any error.
Titmus II Vision Tester	Any error.

(5) In administering any of these protocols, the person conducting the examination should be aware that railroad signals do not always occur in the same sequence and that “yellow signals” do not always appear to be the same. It is not acceptable to use “yarn” or other materials to conduct a simple test to determine whether the certification candidate has the requisite vision. No person shall be allowed to wear chromatic lenses during an initial test of the person's color vision; the initial test is one conducted in accordance with one of the accepted tests in the chart and § 245.117(c)(3).

(6) An examinee who fails to meet the criteria in the chart may be further evaluated as determined by the railroad's medical examiner. Ophthalmologic referral,

field testing, or other practical color testing may be utilized depending on the experience of the examinee. The railroad's medical examiner will review all pertinent information and, under some circumstances, may restrict an examinee who does not meet the criteria for serving as a dispatcher. The intent of §§ 245.117(d) and 245.118(d) is not to provide an examinee with the right to make an infinite number of requests for further evaluation, but to provide an examinee with at least one opportunity to prove that a hearing or vision test failure does not mean the examinee cannot safely perform as a dispatcher.

Appropriate further medical evaluation could include providing another approved scientific screening test or a field test. All railroads should retain the discretion to limit the number of retests that an examinee can request, but any cap placed on the number of retests should not limit retesting when changed circumstances would make such retesting appropriate. Changed circumstances would most likely occur if the examinee's medical condition has improved in some way or if technology has advanced to the extent that it arguably could compensate for a hearing or vision deficiency.

(7) Dispatchers who wear contact lenses should have good tolerance to the lenses and should be instructed to have a pair of corrective glasses available when on duty.

Issued in Washington, D.C.

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Administrator.

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